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(17,040.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 153.

WILLIS THORP, PLAINTIFF IN ERROR,

vs.

S. A. BONNIFIELD ET AL.

TRANSFERRED FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a United States Circuit Court of Appeals for the Ninth Circuit.

WILLIS THORP, Plaintiff in Error,
vs.
S. A. BONNIFIELD and JOHN G. HEID, Defendants in Error. } No. 289.

Transcript of Record.

In error to the district court of the United States for the district of Alaska.

Filed March 20, 1896.

F. D. MONCKTON, *Clerk.*

1 THE UNITED STATES, *District of Alaska,* } *ss:*

Pleas and proceedings began and held in the district court of the United States for the district of Alaska, at the November term, 1895.

Present: The Honorable Arthur K. Delaney, judge.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

On April 15, 1895, the plaintiffs filed their complaint in said cause; which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.

For complaint in the above-entitled action the plaintiff complains and alleges:

That on the 25th day of April, 1895, William M. Bennett, for himself and as the administrator of the estate of Michael Gibbons, deceased, leased and let for the term of two years to one Al Runkle those certain mining premises situate in Silver Bow basin, Harris mining district, Alaska, known as the Aurora Lode claim, U. S. survey, lot No. 41, and in consideration thereof the said
2 Runkle agreed to pay the said Bennett the sum of $500 on or before June 1st, 1894, unless the weather prevented the operating of the quartz mill, and in that event as soon as the ore from the mine could be taken to the mill; $900, payable 30 days after the payment of said $500; $2,300 on or before August 15th, 1894, and $500 in the month of October, 1894, said sums to be used in payment of a certain mortgage on said premises held by Robert Duncan, Jr., and J. Parker Corbus.

That afterwards, to wit, on the 5th day of May, 1894, by mutual agreement between said Bennett and Runkle, S. A. Bonnifield, one of the plaintiffs herein, became a party to said lease, and by consent of said Bennett and Runkle his name was inserted in and added to said lease, and he then and there became one of the lessors of said premises, a copy of which lease, with the agreement for said Bonnifield to become one of the lessors, is hereto annexed, marked "Exhibit A," and made a part of this complaint.

That on the 7th day of May, 1894, the said Al Runkle and S. A. Bonnifield sold, transferred, and assigned for a good and valuable consideration an undivided one-eighth ($\frac{1}{8}$) interest in and to the lease of said Aurora Lode claim, with the consent of said Bennett, to John G. Heid, one of the plaintiffs herein, a copy of which assignment, with the consent thereto, is hereto attached and made a part of this complaint and marked "Exhibit B."

That on or about the 1st day of June, 1894, the said Al Runkle sold, transferred, and assigned unto S. A. Bonnifield, one of the plaintiffs herein, his interest in the lease of said premises and all his right, title, and interest thereto up to and until the 31st day of December, 1894, for a good and valuable consideration and subject to the conditions in said lease, a copy of which assignment is
3 hereto annexed, marked "Exhibit C," and made a part of this complaint.

That afterwards, to wit, on the 26th day of June, 1894, the said S. A. Bonnifield and John G. Heid, with the consent of said William M. Bennett, entered into an agreement and did agree with Willis Thorp, the defendant herein, by which it was agreed by and between said parties that in consideration of said Bonnifield and Heid assigning all their right, title, and interest in and to the lease of said premises and the possession thereof up to and until the 31st day of December, 1894, to said defendant, Thorp, subject to the rents, payments, conditions, and covenants contained in the original lease from said Bennett to said Runkle and Bonnifield and the payment of the mortgage on said premises held by Robert Duncan, Jr., and J. Parker Corbus, which the payments set forth in the original lease were intended to cancel, a copy of which assignment is hereto attached, marked "Exhibit D," and made a part of this complaint, the said Thorp did agree with said Bonnifield and Heid to pay said mortgage, to wit, the sum of $3,686.59, and to assume and pay all and every claim standing against or on account of said premises contracted by said Bonnifield and Runkle at the date thereof.

That the said defendant, Thorp, further agreed to mine, work, and operate said premises, and after making all the payments in said lease mentioned, to wit, the amount of said mortgage and debts contracted on account of said premises, was to retain for himself seven-sixteenths ($\frac{7}{16}$) parts of the profits or net proceeds arising from the operation of said mine and premises and to pay to these plaintiffs, S. A. Bonnifield and John G. Heid, the remaining nine-sixteenths ($\frac{9}{16}$) parts of the profits or net proceeds
4 arising from said operation of said mine and premises in the proportion of $\frac{7}{16}$ to Bonnifield and $\frac{2}{16}$ to Heid.

That under and in accordance with said agreement and assignment of said lease the said Willis Thorp entered into the possession of said premises, and worked, mined, and operated the same up to and until the 31st day of December, 1894, extracting and taking out therefrom gold to the value and amount of $32,000.00, and ore and concentrates to the amount and value of $3,500.00, of which he disposed and sold the same.

That the cost and expense of working, mining, operating, and extracting said gold and ore from said premises was $23,000.00, leaving a balance of profits or net proceeds of $12,500.00, of which the said Bonnifield and Heid were entitled to $\frac{9}{16}$ thereof.

That under said assignment and as a part of the expenses incurred in connection with said premises was the sum of $200 advanced and paid by the said Bonnifield and not repaid him from the earnings of said mine.

That the said defendant, Thorp, has failed and refused to pay said sums or any part thereof, although often demanded.

Wherefore plaintiffs demand judgment against said defendant in the sum of $7,231.25 and costs of action.

JOHNSON & HEID AND
J. F. MALONY,
Att'ys for Plaintiffs.

UNITED STATES, }
Dist. of Alaska, } ss:

S. A. Bonnifield, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 10th day of April, 1895.

[L. S.] J. F. MALONY,
Notary Public.

"EXHIBIT A."

For and in consideration of the sum of one hundred dollars to me in hand paid by Al Runkle and S. A. Bonnifield, the receipt whereof is hereby acknowledged and in further consideration of the payment of the sums of money hereafter to be made to me by said Al Runkle and S. A. Bonnifield, to wit: $500.00 on or before June 1st, 1894, unless the weather prevents starting up the quartz mill to be operated for the treatment of the ores of said Aurora Lode claim, then the said sum of $500.00 shall be payable to me as soon as the ore from said Aurora lode can be taken to the said quartz mill; $900.00 thirty days after the payment of the said sum of $500.00; $2,300.00 on or before August 15th, 1894, and $500.00 in the month of October 1894. I, William M. Bennett, for myself and as administrator of the estate of M. H. Gibbons, deceased, do hereby grant, demise and let unto said Al Runkle and S. A. Bonnifield all the following-described mine and mining property, situate

in Silver Bow basin, Harris mining district, Alaska, to wit: the Aurora Lode mining claim, U. S. survey lot No. 41, together with all and singular the lodes, veins and deposits within the lines of said claim, and all mines, mineral dumps, plant, fixtures, machinery, tramways, improvements, water rights, privileges and appurtenances thereunto in anywise belonging, excepting the "Huntington quartz mill," now situated upon said Aurora Lode claim; with authority to mine and work said Aurora Lode claim as he sees fit, for the term of two years from the date hereof, provided only such work be done in good workmanlike manner, and all ore taken out shall be at the disposal of said Runkel and Bonnifield as he sees fit.

If default shall be made by said Runkel and said Bonnifield in the payment of any of the above-mentioned sums of money,
7 within the time or times hereby limited therefor, all previous installments or sums of money paid hereunder shall be and remain the property of said Bennett and said estate of M. H. Gibbons, deceased, and this lease and contract shall be ended, determined and void.

At any time within two years from date hereof, the said William M. Bennett, for himself and as administrator of the estate of said M. H. Gibbons, deceased, on tender to him by said Runkle and said Bonnifield of the further sum of $35,700.00, agrees to convey by good and sufficient deed to said Al Runkle and Bonnifield, his heirs and assigns, the above and hereinbefore described premises. Said sum of $35,700.00, if not paid before April 25th, 1895, shall bear interest at the rate of 8 per cent. per annum, which interest shall be payable monthly, and the said sum of $35,700.00 is payable on or before April 25th, 1896.

In case the said Al Runkle and Bonnifield shall pay said sum of $35,700.00 or any part thereof before April 25th, 1895, then and in that case the said Runkle and Bonnifield shall be authorized to deduct eight per cent. on all sum or sums paid before said date, as anticipated payments.

This said lease and contract is subject to the conditions of a certain "bond for mining deed" executed by said Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased, to Robert Duncan, Jr. and J. Parker Corbus, on the 9th day of September, 1892, which said bond provides for the payment of $50,000.00 for said Aurora Lode claim, and in case the said R. Duncan, Jr. and J. Parker Corbus, before the expiration of said bond, shall tender to said Bennett and pay to him the said full sum of $50,000.00,
then and in that case the said Al Runkle and said Bonni-
8 field shall receive the sum of $10,000.00, together with a repayment of all sum or sums of money paid to said Bennett hereunder.

Nothing herein contained shall be construed to authorize the said Al Runkle and said Bonnifield to sublet the premises herein described, nor permit any other person or persons to occupy, possess, work or improve the same, without the written consent of the said Bennett, first thereto obtained; but nothing herein contained shall prevent the said Al Runkle and said Bonnifield from selling said

premises, provided the said several sums of money hereinbefore mentioned are paid to said Bennett at the time of such sale.

The said Bennett for himself and as the administrator of the estate of M. H. Gibbons, deceased, expressly reserves to himself any and all claims which he may have for himself and as administrator of said estate, against any and all persons for damages done to said Aurora Lode claim and surface ground and reserves to himself the right to sue any and all persons in order to recover such said damages.

This lease and contract shall further be subject to a certain lease made by and between said Bennett and as administrator, John G. Heid, lessors, and Archibald Campbell lessee, on the 1st day of May, 1890.

In the case the said Huntington quartz mill, hereinbefore mentioned shall be in the way or interfere with the construction of any improvements, contemplated to be erected or constructed by the said Runkle and Bonnifield then and in that case the said Runkle and Bonnifield, at their own cost and expense, shall be authorized to remove the said Huntington quartz mill, using due care in the removal of said mill. All improvements such as buildings, machinery, tramways and other fixtures made or constructed on said premises, shall be and remain the property of said Bennett and said estate, in case this lease and contract is ended, determined or forfeited. It is further agreed between the parties hereto, that so much of the several sums of money (as may be necessary) to wit: $500.00, $900.00 and $2,300.00, hereinbefore mentioned to be paid to said Bennett and said estate, by said Runkle and Bonnifield shall be applied by said Bennett in the payment of a certain promissory note secured by a mortgage on said described premises, executed by said Bennett to R. Duncan Jr. and said J. P. Corbus, dated September 9th, 1892.

In witness whereof, the parties hereto have hereunto set their hands and seals, this 25th day of April, 1894.

W. M. BENNETT. [SEAL.]
W. M. BENNETT,
As Administrator of M. H. Gibbons' Estate.
AL RUNKLE. [SEAL.]
S. A. BONNIFIELD. [SEAL.]

In presence of—

JOHN G. HEID.
D. E. LUTES.

It is hereby mutually agreed and understood by and between the said William M. Bennett, for himself and as administrator of the estate of M. H. Gibbons deceased, the said Al Runkle and said S. A. Bonnifield, that the said S. A. Bonnifield shall be added as a party to the foregoing contract and agreement, but that the addition of the said Bonnifield to said contract and agreement shall in

no way have the effect to alter or change any of the terms and conditions therein set forth.

Juneau, Alaska, May 5th, 1894.

WILLIAM M. BENNETT,
For Himself and as Administrator of the Estate of M. H. Gibbons, Dec.
AL RUNKLE.
S. A. BONNIFIELD.

10 "EXHIBIT B."

Whereas, a certain "working contract sale agreement" dated the 25th day of April 1894, was entered into by William M. Bennett for himself and as administrator of the estate of M. H. Gibbons, deceased, of the one part, and Al Runkle and S. A. Bonnifield of the other part, which said agreement granted to said Runkle and Bonnifield the right and privilege to work and mine the Aurora lode, situated in Silver Bow basin, Harris mining district, Alaska, U. S. survey lot No. 41, as they may see fit and further providing for the sale of said Aurora Lode claim to said Runkle and said Bonnifield, upon the terms and conditions therein set forth as it will more fully appear in a copy of said "working contract sale" agreement hereto annexed and made a part of this assignment.

Now know all men by these presents, that we, Al Runkle and S. A. Bonnifield, for and in consideration of the sum of one dollar, lawful money of the United States, to us in hand paid, the receipt whereof is hereby acknowledged, do by these presents grant, sell, transfer and set over unto John G. Heid of the town of Juneau, in the district of Alaska, his executors, administrators heirs and assignes forever an undivided one-eight- ($\frac{1}{8}$) part or interest of in and to said "working contract sale" agreement hereunto annexed.

To have and to hold the said undivided one-eight- ($\frac{1}{8}$) part or interest in and to said agreement, with all the benefit, profit, and advantage thereof, unto the said John G. Heid, his heirs, executors, administrators and assigns, in as full, ample and beneficial manner to all intents and purposes, as we the said Al Runkle and S. A. Bonnifield, by virtue of said agreement, may or might have or hold the same, if this transfer or grant had not been made.

11 It is further understood that the said Heid shall not be entitled to any dividend or share of the output of said Aurora Lode claim to be worked, mined and operated by the said Runkle and said Bonnifield, until the first four payments in said agreement mentioned together with the costs and expenses of operating and working of said Aurora lode have been fully paid at the date when the four said payments mentioned in said agreement are paid by said Runkle and said Bonnifield; and it is also further understood that, the said John G. Heid shall not be called upon to defray any part of the expenses of operating and working the said Aurora lode, nor shall he be required to pay any part of the said sums of

money constituting the said four payments first mentioned in said agreement.

Juneau, Alaska, May 7th, 1894.

AL RUNKLE.
S. A. BONNIFIELD.

I hereby consent to the above transfer to J. G. Heid above mentioned.

W. M. BENNETT.

Juneau, Alaska, May 7th, 1894.

12 "EXHIBIT C."

For value received, I do by these presents bargain, sell, assign and set over unto S. A. Bonnifield, his heirs and assigns, the within indenture of lease, and all my estate, right, title, interest, claim, property and demand of, in and to the lands, tenements, hereditaments and premises therein mentioned, which I now have, by means of the said indenture or otherwise for and during the term ending, December 31st, 1894, subject nevertheless to the rents, conditions and covenants in said indenture contained. At the expiration of the term therein mentioned, to wit, on the 1st day of January, 1895, the said within indenture of lease shall revive as to me and my rights therein, until the expiration thereof, to wit, the 25th day of April, 1896.

AL RUNKLE.

Witness:
F. W. HEYDE.
JOHN G. HEID.

13 "EXHIBIT D."

Whereas a restraining or injunction order has been issued out of the district court of the United States for the district of Alaska in favor of the plaintiffs, in the case of Robert Duncan, Jr., and J. Parker Corbus, plaintiffs and mortgagees and against William M. Bennett, mortgagor, for himself and as administrator of the estate of Michael Gibbons, deceased, Al Runkle and S. A. Bonnifield, defendants, restraining and enjoining said defendants from mining, taking out and removing ore oil of and from the Aurora Lode claim, situate in Silver Bow basin, Harris mining district, Alaska, and whereas Willis Thorp of the town of Juneau, Alaska, has satisfied the claim of said plaintiffs, at the request of said defendants and thereby has caused said injunction order to be vacated;

Therefore in consideration of said Willis Thorp paying and satisfying said claim of plaintiffs in said case or suit, I, S. A. Bonnifield and I, John G. Heid, do by these presents bargain, sell, assings, and set over unto said Willis Thorp, his heirs and assigns, the within and annexed indenture of lease and all our estate, right, title, interest, claim, property and demand of in and to the lands, tenements, hereditaments and premises therein mentioned, which we now have by means of said indenture or otherwise, for the term

ending December 31st, 1894, that is to say the said Thorp shall be the absolute assignee of the within and annexed lease for the term up to and ending December 31st, 1894; subject nevertheless to the rents, payments, conditions and covenants in the said indenture of lease contained, and subject to the further condition and stipulation to wit: that the said Thorp shall during said term, be entitled to and receive and retain to and for himself, after making all
14 payments in said lease mentioned, seven-sixteenths ($\frac{7}{16}$) parts of the profits or net proceeds derived by him from the operating of said Aurora lode or mine, in the working or mining the same and milling the ores extracted and mined therefrom, the other nine-sixteenths ($\frac{9}{16}$) parts of the net proceeds or profits derived by said Thorp, during the said term, from the operating of the said mine and milling the ores therefrom the said Thorp shall pay over to said S. A. Bonnifield and said John G. Heid, or their joint order.

At the expiration of said term, to wit, the 1st day of January, 1895, the said Thorp shall quit and deliver up the possession of said Aurora lode or mine and premises to said S. A. Bonnifield and John G. Heid, or their agent or attorney, peaceably and quietly, in good order and condition, with all the appurtenances and improvements. The said Thorp shall assume and pay all and every claim now standing against the said Aurora Lode claim by reason of the working and mining of the same by said S. A. Bonnifield and Al Runkle, which said claims shall be paid by said Thorp, in addition to the payments in said lease mentioned.

In testimony whereof we have hereunto set our hands and seal this 26th day of June, 1894.

S. A. BONNIFIELD. [SEAL.]
JOHN G. HEID. [SEAL.]

(Endorsed:) No. 439. U. S. district court for the district of Alaska. S. A. Bonnifield and John G. Heid, plaintiffs, *vs.* Willis Thorp, defendant. Service of the within complaint is hereby admitted this 15th day of April, A. D. 1895. Bostwick & Crews, attorneys for defendant. Filed Apr. 15, 1895. Charles D. Rogers, clerk. Johnson & Heid and John F. Malony, attorneys for pl'ffs.

15 And afterwards, to wit, on said date, a summons was issued, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska

S. A. BONNIFIELD and JOHN G. HEID *vs.* WILLIS THORP. } No. 439. Summons.

The President of the United States of America to Willis Thorp, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the

complaint filed against you in the above-entitled action within 20 days from the date of the service of this summons upon you, and if you fail so to appear and answer for want thereof the plaintiff will take judgment against you for $7,231.25.

And this is to command you, the marshal of said district or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Warren Truitt, judge of said district court, and the seal of said court affixed, at Sitka, in said district, this 15th day of April, 1895.

[L. S.] CHARLES D. ROGERS, *Clerk.*

JOHNSON AND HEID AND
JOHN F. MALONY,
Pl'ffs' Att'ys.

(Endorsed:) No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Summons. Returned and filed April 27, 1895. Charles D. Rogers, clerk.

16 *Marshal's Return to Summons.*

UNITED STATES,
District of Alaska, } ss:

I hereby certify that I received the within summons on the 16 day of April, and that on the 16 day of April, 1895, I served the same by delivering a true copy hereof to the within-named Willis Thorp personally in Juneau, district of Alaska.

LOUIS L. WILLIAMS,
U. S. Marshal,
By WILLIAM M. HALE, *Deputy.*

17 And afterwards, to wit, on the 4th day of May, 1895, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN H. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Notice of Appearance.

You and each of you will please take notice that the undersigned have been retained and employed by the defendant, Willis Thorp, in the foregoing-entitled cause.

You will further please take notice that the defendant, Willis Thorp, hereby enters his appearance in the foregoing-entitled cause by and through his attorneys, Messrs. Bostwick and Crews, and all

papers for service upon the defendant in said cause may be served on the undersigned at their office, at Juneau, Alaska.

To the above-named plaintiffs, S. A. Bonnifield and John G. Heid, and to their attorney, J. F. Malony.

Dated Juneau, Alaska, May 4th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant, Juneau, Alaska.

Due and personal service of a true copy of the foregoing motion is hereby admitted this 4 day of May, A. D. 1895.

J. F. MALONY AND
JOHNSON & HEID,
Attorneys for Plaintiffs.

18 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of appearance. Bostwick & Crews, attorneys for defendant. Filed May 4, 1895. Charles D. Rogers, clerk.

And afterwards, to wit, on said 4th day of May, 1895, the defendant filed the following notice of motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice of Motion.

Please take notice that the defendant, Willis Thorp, will on the 20th day of May, 1895, at the court-house, in the city of Juneau, Alaska, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard or at such other time as the court may direct, bring on for hearing before Honorable Warren Truitt, judge of the above-entitled court, the motion heretofore served and filed by the defendant in this cause, requiring plaintiffs to make their complaint in the foregoing-entitled cause more definite and certain in the following particulars, to wit:

By stating the amount of the mortgage which plaintiffs allege that the defendant Thorp agreed to pay, in line four (4), on page (2), of said complaint.

19 To J. F. Malony, attorney for plaintiffs, Juneau, Alaska.

Dated Juneau, Alaska, May 4th, A. D. 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

Due and personal service of a true copy of the foregoing notice of motion is hereby admitted this 4 day of May, A. D. 1895.

J. F. MALONY AND
JOHNSON & HEID,
Attorneys for Plaintiffs.

(Endorsed:) Original, No. 439. In the district court of United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of motion. Bostwick & Crews, att'ys for def't. Filed May 4, 1895. Charles D. Rogers, clerk.

And afterwards, to wit, on said 4th day of May, 1895, the defendant filed the following motion, which is in words and figures following, to wit:

In the District Court of United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Motion for Order Requiring Plaintiffs to Make Complaint More Definite and Certain.

Comes now the defendant, Willis Thorp, by and through his attorneys, Messrs. Bostwick and Crews, and moves the court for an order requiring the plaintiffs herein to make their complaint more definite and certain in the following particulars, to wit:

By stating and inserting in line four (4), on page two (2),
20 of said complaint, the amount of the mortgage which plaintiffs allege that the defendant promised and agreed to pay.

This motion is based upon the plaintiffs' complaint heretofore served and filed in this cause, and the defendant will upon the presentation of said motion refer to said complaint.

Dated Juneau, Alaska, May 4, A. D. 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

Due and personal service of a true copy of the foregoing motion is hereby admitted this 4 day of May, A. D. 1895.

J. F. MALONY &
JOHNSON & HEID,
Of Counsel for Plaintiffs.

(Endorsed:) Original, No. 439. In the district court of United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Motion. Bostwick & Crews, att'ys for def't. Filed May 4, 1895. Charles D. Rogers, clerk.

And afterwards, to wit, on the 18th day of May, 1895, the following further proceedings were had and appear of record in said cause, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Order.

In this action the motion of defendant coming on regularly to be heard for an order making plaintiffs' complaint more definite

21 and certain by inserting the amount of the mortgage which it alleges that the defendant Thorp agreed to pay, in line four, on page two, of said complaint;

And the court, having listened to argument of counsel and being fully advised in the premises, now grants said motion.

Wherefore it is hereby ordered that the plaintiffs insert in the original complaint the amount of the mortgage which they allege that the defendant Thorp agreed to pay.

And it is hereby further ordered that the defendant Thorp have five (5) days in which to file a demurrer to the plaintiffs' complaint, or in case he does not file a demurrer ten (10) days in which to file his answer.

And afterwards, to wit, on the 23 day of May, 1895, the defendant filed a demurrer to plaintiffs' complaint, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Demurrer.

Comes now the defendant, Willis Thorp, by and through his attorneys, Messrs. Bostwick and Crews, and demurs to the plaintiffs' complaint, now on file in this action, upon the following grounds, to wit:

That the said complaint does not state facts sufficient to constitute a cause of action.

BOSTWICK & CREWS,

22 *Attorneys for Defendant.*

Juneau, Alaska, May 23rd, 1895.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Demurrer. Filed May 23, 1895. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska. Copy of within demurrer received and due service of the same acknowledged this 23rd day of May, 1895. J. F. Malony & Johnson & Heid, attorneys for plaintiffs.

And afterwards, to wit, on the 3d day of December, 1895, the following further proceedings were had and appear of record in said cause to wit:

S. A. BONNIFIELD ET AL. *vs.* WILLIS THORP. } No. 439.

Come now the parties hereto, by their respective attorneys, and defendant's demurrer to plaintiffs' complaint coming on to be heard,

and the court, being sufficiently advised in the premises, overrules said demurrer; to which ruling of the court the counsel for the defendant excepts, and defendant is given until Monday, December 23, 1895, to file his answer to said complaint.

And afterwards, to wit, on the 26th day of December, 1895, the plaintiffs filed a motion for judgment, which is in the words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.

23 Come now the plaintiffs in the above-entitled action, by Johnson & Heid, their attorneys, and move the court for judgment for want of answer for the reason that it appears from the record in this action that the defendant had been duly served with summons and has failed to answer the complaint of plaintiffs herein, and that the time for answering the said complaint has expired.

JOHNSON & HEID,
Attorneys for Plaintiffs.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. Bonnifield & Heid *vs.* Willis Thorp. Motion for judgment for want of answer. Filed Dec. 26, 1895. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

And afterwards, to wit, on said 26th day of December, 1895, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

The defendants having been duly served with the summons and complaint and having failed to answer the complaint and the time for answering the complaint having expired and no answer having been filed with the clerk of the court within the time allowed by the court—

Now, on motion of plaintiffs' attorneys in open court, the default of the defendant is hereby entered.

24 And afterwards, to wit, on the 10th day of January, 1896, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

You will please take notice that I do not wish you to longer represent me in the foregoing-entitled cause; that your employment by me in said action is hereby terminated and at an end; that you will from the date of the service of this notice upon you take no other steps for me as my attorney in said cause, and any act or proceeding had or done by you in said cause for or in my behalf from the date of the service of this notice is absolutely unauthorized and void as far as I am concerned.

Juneau, Alaska, November 9th, 1895.

S. A. BONNIFIELD.

To J. F. Malony, Esq., attorney-at-law, Juneau, Alaska.

UNITED STATES, } *ss:*
District of Alaska, }

I hereby certify that I served a true copy of the foregoing notice upon John F. Malony, at Juneau, Alaska, on the 19th day of November, 1895.

Dated Juneau, Alaska, November 20th, 1895.

25 W. C. WATTS,
Deputy United States Marshal for Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of dismissal of John F. Malony by S. A. Bonnifield. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following demand, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

You will please forthwith deliver to the bearer, William C. Watts, all papers, receipts, contracts, and documents of every kind, nature, and description now in your possession and which belong to me and which were by me left with you in the foregoing-entitled cause or any other cause or causes.

Dated Juneau, Alaska, November 13th, 1895.

S. A. BONNIFIELD.

To J. F. Malony, Esq., attorney-at-law, Juneau, Alaska, United States.

26 DISTRICT OF ALASKA, *ss:*

I hereby certify that I served a true copy of the foregoing notice upon John F. Malony, at Juneau, Alaska, on the 19th day of November, 1895.

Dated Juneau, Alaska, November 20th, 1895.

W. C. WATTS,
Deputy United States Marshal for Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Demand of S. A. Bonnifield on John F. Malony for all papers. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following stipulation, which is in words and figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Stipulation.

It is hereby stipulated and agreed that defendant may have until March 1st, 1896, in which to serve and file his answer in the foregoing cause.

Dated December 24th, 1895.

S. A. BONNIFIELD, *Plaintiff.*
BOSTWICK & CREWS,
Attorneys for Defendant.

27 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Stipulation. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendants; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following affidavit; which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Affidavit.

UNITED STATES OF AMERICA, } ss:
For the District of Alaska, }

H. Bostwick, being first duly sworn, upon oath deposes and says as follows: First, that affiant is a member of the firm of Bostwick and Crews, attorneys-*of*-law, at Juneau, Alaska, and that said firm are the attorneys for the defendant in the foregoing-entitled cause. Second, that this foregoing-entitled action was commenced on the 15th day of April, 1895, and summons and complaint was personally served upon the defendant on the 16th day of April, 1895; that the defendant, through his attorneys, Messrs. Bostwick & Crews, served and filed general notice of appearance in said cause on the 4th day of May, 1895. Third, that on the 10th day of June the plaintiffs filed affidavit and bond for an attachment, and that attachment was thereupon issued, and that thereafter and on,
28 to wit, June 17th, said attachment was duly executed by the United States marshal in and for Alaska, and all of the property of the defendant was attached.

That subsequently and on, to wit, July 17th, the defendant executed and caused to be executed a delivery bond to the United States marshal, claiming a redelivery of the property therebefore attached, and that thereupon the said property was released from said writ of attachment and delivered to the defendant herein by the United States marshal.

That thereafter and on, to wit, July 15th, 1895, and order was made in pursuance of due notice by defendant discharging the attachment heretofore issued in this cause upon the due execution by defendant of an undertaking conditioned to pay any judgment obtained against the defendant in this action, and that said undertaking was signed by the defendant, as principal, and by Archie Campbell, B. M. Behrends, C. W. Young, Wm. M. Ebner, Emery Valentine, E. O. Decker, J. M. Decker, and John Olds, as sureties.

That on the 23rd day of May, 1895, the defendant served and filed a demurrer to the plaintiffs' complaint herein on the ground that the facts set forth in plaintiffs' complaint were not sufficient to constitute a cause of action; that on the 3rd day of December, after argument of said demurrer, the same was by the court overruled and the defendant given 20 days in which to file his answer.

Fourth. That the attorneys for defendant labored under the impression that they had sixty days' time in which to file answer in this case for the reason that — the several other cases in which defendant's attorneys were interested sixty days' time had been allowed for answer, and attorneys for defendant did not know that
29 they only had twenty days to answer in this cause until on the morning of the 23rd day of December, 1895; that affiant,

upon examination of his office docket, learned that answer was due on that day; that affiant immediately went to the office of Messrs. Johnson & Heid for the purpose of seeing said attorneys and getting an extension of time in which to file answer for defendant; that said Johnson & Heid nor either of them was in their office when affiant called at 10 o'clock a. m.; that affiant was engaged in his office the balance of said day and did not have an opportunity to see Messrs. Johnson & Heid until the morning of December 24th; that affiant saw Charles Sumner Johnson on Front street at about 10 o'clock in the morning; that said Johnson had a grip in his hand and was going towards the Juneau wharf; that affiant accosted Johnson, saying, Johnson, where are you going? Johnson replied that he was going down to the wharf; that affiant said to Johnson that the time was up for answering in the foregoing-entitled cause, and that the defendant Thorp was out of the Territory, and that affiant wanted a stipulation giving defendant further time to answer; that Johnson replied that affiant had better see Mr. Heid, as he was interested in the case; that soon after affiant prepared a stipulation, and went to the office of Messrs. Johnson & Heid, and then and there stated to Messrs. Johnson & Heid that Mr. Thorp had been unexpectedly called away, and that he was then in North Yakima, State of Washington, for the purpose of looking after his lawsuit, to which he was a party, and that affiant could not prepare an answer in the case without the presence of Thorp; that Johnson & Heid then and there refused to give affiant any further time in which to file answer in this case, stating that defendant Thorp was not entitled to any favors from them; that affiant said to Johnson & Heid that unless they gave him time to answer by stipulation that it would compell affiant to go to Sitka and obtain from the court an order giving defendant additional time in which to answer. Fifth, that subsequently and at about 2.30 o'clock in the afternoon of said day the plaintiff S. A. Bonnifield called at affiant's office; that he came there unsolicitated by affiant to look after other matters than the suit in question; that affiant called Bonnifield's attention to the fact that the time for answering in this cause had expired, and that affiant would like additional time, and that the said Bonnifield then and there voluntarily and of his own free act signed the stipulation, hereto annexed and marked Exhibit A, giving affiant until March 1st, 1896, in which to file his answer for the defendant; that it was too late for affiant to forward said stipulation for filing with the clerk of this court at Sitka, as the ferry-boat had left for the island, and there was no way to reach the city of Topeka in time in order to send said stipulation to Sitka.

That affiant's reason for having said Bonnifield sign said stipulation in person was that said Bonnifield had during the last term of court discharged his attorney, J. F. Malony, and up to the present time, as deponent — advised and believed, the said Bonnifield has not employed other counsel; at all events, no notice has been given to the defendant or his attorneys, verbally or otherwise, of any substitution of attorneys in place of John F. Malony, Esq.

That, upon the argument of the demurrer at the last term of court

filed by defendants in this cause, the said Bonnifield was unrepresented by counsel, Messrs. Johnson & Heid appearing only for the plaintiff J. G. Heid. Affiant is informed and verily believes to be true that Messrs. Johnson & Heid have no authority to appear
31 for S. A. Bonnifield in this action, and that any action taken by them for Bonnifield is unauthorized & illegal, rendering such action void; that said Johnson & Heid have never in any manner advised the defendant or his attorneys that they were authorized to act for Bonnifield, but, on the other hand, stated in open court that they were not authorized to appear for Bonnifield.

Sixth. That the said default taken by plaintiffs against the defendant on the 26th day of December, 1895, was taken through mistake, inadvertence, and neglect of the attorneys for defendant, as heretofore set forth fully; that affiant relied upon the stipulation of plaintiff S. A. Bonnifield, and therefore did not go to Sitka to get and order of this court giving defendant additional time in which to answer. Affiant further relied upon the fact that the attorneys for John G. Heid, knowing full well that defendant intended to answer, would not attempt to take default or judgment against the defendant herein; that the absence of the defendant from the Territory to attend to a lawsuit, to which he was a party, at North Yakima, Washington, made it impossible for the defendant to answer within the twenty days, on account of the fact that the attorneys for defendant had proceeded with the case under the impression that they had sixty days from the overruling of said demurrer in which to answer, and that when affiant discovered his error, on, to wit, December 23, the defendant Thorp had gone to Washington; that affiant communicated all these facts to Messrs. Johnson & Heid when he requested the signing of a stipulation giving defendant additional time to answer.

That affiant further states that the defendant, Willis Thorp, has fully stated the facts in this case to affiant and to the firm of Bostwick & Crews, counsel for defendant in this cause, and from
32 such statements made by defendant affiant believes that the defendant has a good and substantial defence on the merits of the action.

Affiant further states that defendant does not desire to delay this cause, and that if he be given until March 1st defendant will serve and file his answer herein; that defendant is now in the State of Washington, and is at North Yakima, and affiant is informed and believes to be true *and* that defendant will not return to Juneau before about February 15th, 1896; that affiant makes this affidavit for the reason that he is one of the attorneys for defendant and for the reason that the defendant is absent from the Territory.

Affiant further states that on the 13th day of April, 1895, the defendant, Willis Thorp, made a statement showing, approximately, the earnings and expenses of conducting the mine under the lease and contract set forth in plaintiffs' complaint herein, and that on the same day defendant made an affidavit, swearing that said account was approximately a true and correct statement of all matters connected with his lease of the Bennett mine for 1894; that a copy

of said affidavit and statement of account is here annexed and marked Exhibit B and is made a part of this affidavit. Affiant further states that the said default was taken by the plaintiffs against the defendant through fraud practiced by Johnson & Heid, they well knowing at the time they took default that the defendant intended to file his answer in this cause.

H. BOSTWICK.

Subscribed and sworn to before me this 28th day of December, 1895.

[L. S.]

J. T. HAMILTON,
Notary Public for Alaska.

33

"EXHIBIT A."

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Stipulation.

It is hereby stipulated and agreed that defendant may have until March 1st, 1896, in which to serve and file his answer in the foregoing cause.

Dated December 24, 1895.

S. A. BONNIFIELD, *Plaintiff.*
BOSTWICK & CREWS,
Attorneys for Defendant.

34

"EXHIBIT B."

UNITED STATES,
District of Alaska, } *ss:*

Willis Thorp, being first duly sworn, upon oath says that the foregoing statement of account is approximately a true and correct statement of all matters connected with his lease of the Bennett mine for 1894.

That the foregoing and hereto annexed statement contains the items of expenses incurred in running said mine and the earnings of said mine as nearly as affiant could at the present time ascertain, and that upon a full and complete statement in detail of all and every transaction connected with the lease of said mine for 1894 the same will not materially differ from the hereto annexed account.

WILLIS THORP.

Subscribed and sworn to before me this 13th day of April, A. D. 1895.

HARRISON BOSTWICK,
Notary Public for Alaska.

35 *Bennett Mine Statement—Approximated.*

Total income		$33,000.00
Exp.		
Cost of labor	9,051.70	
Profit and loss	34.60	
Cost of mine supplies, tools, &c	1,075.95	
Cost of cook-house supplies	4,276.07	
Expense—general	4,895.59	
Other expenses	9,130.00	
Balance	4,536.09	
	33,000.00	33,000.00

$\frac{9}{10}$ 4,536.09 $2,551.

Partner's credit		2,551.00
D. C. mortgage	3,936.59	
Fuller note	518.41	
Bonnifield debit	112.00	
Balance Heide bill	200.00	
Balance		2,216.00
	4,767.00	4,767.00
Balance due	$2,216.00	

36 (Endorsed:) Original No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavit of H. Bostwick. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska. Copy of within affidavit received and due service of the same acknowledged this 28th day of December, 1895. Johnson & Heid, attorneys for pl'ffs.

37 And afterwards, to wit, on the said 10th day of January, 1896, defendant filed the following notice of motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska

S. A. Bonnifield and John G. Heid, Plaintiffs, *vs.* Willis Thorp, Defendant. } No. 439. Notice of Motion.

Take notice that upon the affidavit a copy of which is herewith served the undersigned will move the court, at Sitka, on the arrival of the next mail steamer, the City of Topeka, on or about the 8th day of January, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the order of default granted

against the defendant in this action on the 26 day of December, 1895, and also for an order setting aside all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare and serve his answer herein. The defendant's reasons for asking to have said default vacated and set aside are as follows, to wit: First, upon the ground that said default was taken against the defendant through his mistake, inadvertence, surprise, and excusable neglect;
38 second, for the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield, giving the defendant until March 1st, 1896, in which to serve and file his answer; third, for the reason that the defendant's attorneys herein notified the attorneys for John G. Heid, to wit, Johnson & Heid, that they intended to file answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson & Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that the defendant was unexpectedly called away to attend a lawsuit, in which he was a party defendant, at North Yakima, in the State of Washington, and the defendant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that the defendant's attorneys inadvertently overlooked the date when an answer was due in this case until the morning of the 23rd of December, at which time the defendant had gone to Washington; sixth, for the reason that the defendant has a good, substantial, and meretorious defence in this cause.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Johnson & Heid, attorney- for John G. Heid, and to S. A. Bonnifield, plaintiff.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of motion to set aside order of default. Filed Jan. 10, 1896. Charles D. Rogers, clerk.
39 Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska. Copy of within notice of motion received and due service of the same acknowledged this 28 day of December, 1895. Johnson & Heid, attorney- for pl'ffs.

40 And afterwards, to wit, on the said 10th day of January, 1896, the defendant filed the following motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Motion.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick & Crews, and moves the court for an order vacating, setting aside, and holding for naught the order of default heretofore granted in this action against the defendant and in favor of the plaintiffs; also for an order setting aside and holding for naught all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare, serve, and file his answer herein; that the defendant's reasons for asking to have said default set aside and held for naught, and all subsequent proceedings had by plaintiff set aside and held for naught, and for additional time to serve and file his answer herein are based upon the following grounds, to wit:

First. Upon the ground that said default was taken against the defendant through his mistake, inadvertance, surprise, and excusable neglect.

Second. For the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield giving the defendant until March 1st, 1896, in which to serve and file his answer.

Third. For the reason that the defendant's attorneys herein
41 notified the attorneys for John G. Heid, to wit, Johnson & Heid, that they intended to file an answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson & Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that defendant was unexpectedly called away to attend a lawsuit in which he was a party defendant, at North Yakima, in the State of Washington, and the defendant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that the defendant's attorneys inadvertently overlooked the date when an answer was due in this case until the morning of the 23rd day of December, at which time the defendant had gone to Washington.

Sixth. For the reason that the defendant has a good, substantial, and meritorious defense in this cause.

Seventh. For the reason that the said default was taken by the plaintiffs against the defendant through fraud practiced by Johnson & Heid, attorneys for the plaintiff Heid.

This motion is based upon the affidavit of H. Bostwick, herewith filed, and upon all of the records, files, papers, and proceedings had and done in this action.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Motion. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys
42 for defendant; office address, Juneau, Alaska. Copy of within motion received and due service of the same acknowledged this 28th day of December, 1895. Johnson & Heid, attorney-for pl'ffs.

43 And afterwards, to wit, on the said 10th day of January, 1896, the following stipulation was filed, which is in words and figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Stipulation.

It is hereby stipulated and agreed by the plaintiffs and the defendants, by and through their respective attorneys, that defendant's motion heretofore served and filed in this cause to vacate and set aside the order of default granted on December 26th, 1895, in favor of plaintiffs and against defendant and also defendant's motion for further time to answer in this cause be, and the same is hereby, submitted upon the affidavits and all of the papers, files, records, and proceedings had and done in this cause, to the court, without argument, for the decision thereon.

Dated Juneau, Alaska, January 8, 1896.

JOHNSON & HEID,
Plaintiffs' Attorneys.
BOSTWICK & CREWS,
Attorneys for Defendant.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Stipulation to submit
44 cause without argument. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant; office address, Juneau, Alaska.

And afterwards, to wit, on the said 10th day of January, 1896, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Affidavit.

THE UNITED STATES, *District of Alaska,* } *ss.*:

John G. Heid, being first duly sworn, says he is a member of the law firm of Johnson & Heid, of Juneau, Alaska, and is also one of the plaintiffs named in the above-entitled action; that said law firm of Johnson & Heid is and at all times since the commencement of the said above-entitled action has been the attorneys for the above-named plaintiffs, as will fully appear from the records and files in said action; that the allegation in the affidavit of H. Bostwick filed herein to the effect that Johnson & Heid stated in open court that they were not authorized to appear for plaintiff Bonnifield is wholly untrue, but, on the contrary, affiant says defendant's attorneys were present in court when C. S. Johnson, of the said law firm of Johnson & Heid, stated that said law firm of Johnson & Heid appeared for and represented said Bonnifield and heard said C. S. Johnson argue the demurrer referred to in said H. Bostwick's affidavit; and the action of said H. Bostwick in submitting to said law firm of Johnson & Heid, this day, a stipulation with reference to his motion to set aside the default entered herein sustains this affiant in his allegation that said Johnson & Heid were at all times since the commencement of said action the authorized attorneys for said plaintiff, Bonnifield.

That in frequent conversations had with said Bonnifield this affiant had never been told that said Bonnifield did not desire the said firm of Johnson & Heid to represent him in said action; on the contrary, expressly stated that it was his positive wish that the said Johnson & Heid should take full care of and manage the said action for him and in his interest, and that when this affiant asked said Bonnifield his reason for signing the stipulation referred to and annexed to said H. Bostwick's affidavit said Bonnifield stated that said Bostwick asked him to sign the same, assuring him (said Bonnifield) that he could in no way lose any rights in said action by so doing; that this action could not be tried before the next term of court, and that he, said Bonnifield, signed said stipulation, believing that the statements made by said Bostwick were true, and that he in no way would thereby prejudice any rights of his own or of his coplaintiff in said action.

JOHN G. HEID.

Subscribed and sworn to before me this 8th day of January, 1896.

[L. S.]

C. S. JOHNSON,
Notary Public for Alaska.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Affidavit of

J. G. Heid. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

46 And afterwards, to wit, on the said 10th day of January, 1896, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Affidavit.

THE UNITED STATES, *District of Alaska,* } *ss:*

C. S. Johnson, being first duly sworn, deposes and says he is a member of the law firm of Johnson & Heid and is and at all times since the commencement of the above-entitled action has been one of the attorneys for the above-named plaintiffs, as will fully appear from the records and files in said action; that the allegation in the affidavit of H. Bostwick, filed herein, to the effect that Johnson & Heid stated in open court that they were not authorized to appear for plaintiff Bonnifield is wholly untrue, but, on the contrary, affiant says defendant's attorneys were present in open court when this affiant stated that he appeared for and represented said Bonnifield and heard this affiant argue the demurrer referred to on behalf of said Bonnifield, as well as of said John G. Heid, and this affiant denies that H. Bostwick was ever informed or believes that Johnson & Heid have no authority to appear for S. A. Bonnifield in this action, or that any action taken by them for said Bonnifield is unauthorized or illegal or renders such action void, but that
47 said statement was made for the purpose of deceiving this court and was an attempt to excuse said attorneys' peculiar conduct in going to affiant's client to procure a stipulation which had been denied by said Bonnifield's attorneys.

Affiant further says that H. Bostwick did not say to Johnson & Heid or either of them, as alleged in his affidavit, that unless they gave him time to answer by stipulation that it would compel him to go to Sitka and obtain from the court an order giving defendant additional time in which to answer; that he did not submit any stipulation to affiant or to John G. Heid, and affiant therefore denies that any such was prepared.

Affiant says that no application of any kind for an extension of time in which to answer was made to plaintiffs' attorneys until the time for answering had expired, although said attorneys have been in their office regularly every day since the demurrer referred to was overruled; that the said Bostwick, after the time for answering had expired and after he had been refused an extension of time by plaintiffs' attorneys, saw S. A. Bonnifield, one of the plaintiffs, and

by falsely and fraudulently representing to said Bonnifield that an extension of time in which to answer could in no way affect his interest in the premises, that the case could not be tried until the next term of court, and that no delay would result in the hearing of said cause, and that he would lose no rights thereby, induced said Bonnifield to sign the so-called stipulation filed with said affidavit.

Affiant says that after a careful examination of the facts obtainable in this action he is convinced that defendant has no legal or equitable defense to interpose; that one of his reasons for such belief is that defendant has stated in affiant's presence that the net profits from the operation of said mine *was* at least $8,000.00,
48 and he believed would be more.

Affiant says he has no reason to believe that defendant ever made the affidavit, a copy of which is purported to be set forth in Bostwick's affidavit herein, except the allegation of the fact therein contained, and affiant therefore calls for the original affidavit.

C. S. JOHNSON.

Subscribed and sworn to before me this 7th day of January, 1896.
[L. S.] J. T. HAMILTON,
Notary Public for Alaska.

(Endorsed:) No. 439. In U. S. dist. court, dist. of Alaska. S. A. Bonnifield *et al. vs.* Willis Thorp. Affidavit. Filed Jan. 10, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

And afterwards, to wit, on said 10th day of January, 1896, the plaintiffs filed the following brief, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} Brief of Plaintiffs.

Entry of default after demurrer overruled was held regular, although no notice of the overruling of the demurrer had been served in writing on the defendant, where his attorney was present in court and asked time in which to answer.
49 Hill's Code, note, page 333; Barron *vs.* Deleval, 58 Cal., 95.

A default judgment has the same effect as *res adjudicata* on the merits.
Hill's Code, note, page 333; Neil *vs.* Tolman, 12 Oregon, 289.

Neglect of the attorney is neglect of the party.
Spaulding *vs.* Thompson, 74 Am. Dec., 221 (12 Ind., 477).

A motion to open up a default and to set aside a judgment should be accompanied with a copy of the verified answer which the party desires to be permitted to file, so that the court may judge whether there be a meritorious defense.

Bailey *vs.* Williams, 6 Oregon, page 73.

With respect to section 102, Hill's Code, and 100, old Code, under which defendant's attorneys seek to set aside the default entered in the above-entitled action, the supreme court of Oregon in the case of Deering *vs.* Quinvey, 26 Oregon, pp. 558 and 559, says: "The liberal provisions of the statute above quoted are intended for the benefit of those who by reason of any of the causes there assigned have not had their day in court. The defendants, having had this right, cannot claim any relief under that section of the statute."

Respectfully submitted.

JOHNSON & HEID,
Attorneys for Plaintiffs.

No. 439. In U. S. dist. court, dist. of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Brief of plaintiffs. Filed Jan. 10, 1896. Charles D. Rogers, clerk.

50 And afterwards, to wit, on the 25th day of January, 1896, the defendant filed the following brief, which is in words and figures following, to wit:

In the District Court of the United States in and for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiff-, *vs.* WILLIS THORP, Defendant. } No. 439. Defendant's Brief.

How and when order of default and judgment will be vacated.

Hill's Code of Oregon, vol. 1, sec. 102, page- 242, '3.

Every court has inherent power to vacate entries in its records for judgments, orders, or decrees.

Ladd *vs.* Mason, 10 Oregon, 308.

The supreme court has power under sec. 102 of the Civil Code (Hill's) to entertain an application to relieve a party from a decree taken against it "through its mistake, inadvertence, or excusable neglect or surprise."

Branson *v.* The Oregon R'y Co., 10 Oregon, 278.

The power to relieve from judgment under this section is discretionary, but the action of the court will be reversed for abuse of discretion.

Bailey *vs.* Taaffe, 29 California, 422.
Johnson *vs.* Eldred, 13 Wisconsin, 482.
Powell *vs.* Weith, 68 N. C., 342.

The power is to be liberally exercised.
Roland *vs.* Kreyenbragen, 19 Catr., 455.
Mason *vs.* McNamara, 57 Ill., 274.

51 Neglect of an attorney is neglect of the party, and if excusable will be ground for relief.
Austin *vs.* Nelson, 11 Mo., 192.
Spaulding *vs.* Thompson, 12 Ind., 477.
See notes to sec. 102, Hill's Code of Oregon.

Where the merits are shown by affidavits, counter-affidavits on that question will not be heard.
Gracier *vs.* Wier, 45 California, 54.
See full discussion on this topic in Freeman on Judgments, chapter VII.

General appearance of defendant in person or by attorney entitles him to notice in writing of all subsequent proceedings.
Sec. 822, vol. 1, Hill's Code of Washington.
" 530, vol. 1, " " of Oregon, page 471.

Also see other sections in title III as to notices, when and how served.
Estee's Practice, sec. 3959, vol. 3, page 34.
California Code Civil Practice, sec. 1014.

Costs of motion, when allowed.
Sec. 568, Hill's Code of Oregon, vol. 1, page 495.

We are of the opinion that where a party has appeared generally in a cause, that he is entitled to notice of all subsequent proceedings; this is the practice in Washington, California, New York, and most, if not all, of the code States.

We think that section 530, vol. 1, Code of Oregon, contemplates that where a party has appeared he is entitled to notice of all subsequent proceedings in the action.

The plaintiff gave no notice to defendant in this case of his motion for default.

52 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Brief of defendant. Judgment or order, when and how vacated. Filed Jan. 25, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendants.

53 And afterwards, to wit, on the said 25th day of January, 1896, the following further proceedings were had in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID, Pl'ffs,
vs.
WILLIS THORP, Def't. } No. 439. Opinion.

This is an action at law brought to recover certain rents and profits alleged to be due the plaintiffs from the defendant under a certain indenture of lease of the Aurora Lode claim, United States survey No. 41, situated in the Silver Bow basin, Harris mining district, Alaska. The complaint was filed on the 15th day of April, 1895, and personal service of the summons was had on the next day, and on the fourth day of May, 1895, defendant entered an appearance by his attorneys. On the 23rd of the same month a general demurrer was entered, which, after hearing, was, on the 3rd day of December, 1895, overruled and an order entered giving the defendant twenty days to answer. On failure to so answer, an order of default was entered against him on the twenty-sixth day of December, 1895. On December twenty-eight motion to vacate the default was served, and by stipulation made January eight, 1896, the motion was submitted on affidavits and all the papers, records, and proceedings in the cause.

While the courts are vested with a large discretion in determining applications of this character, its exercise must be confined to the limits prescribed by statute, which, so far as this court is concerned, are laid down in section 102, Hill's Code of Oregon, pages 242 and 243. This section provides that the court may, in its dis-
54 cretion, "relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."

The only testimony submitted in support of the application is the affidavit of one of the attorneys for the defendant. The allegations therein set forth are substantially to the effect that he was under the impression that the time to answer was sixty days, but on examination of his office docket on the morning of the 23rd of December, 1895, he learned that the answer was due that day; that he went to the office of Johnson and Heid, the attorneys of record for the plaintiffs, to get an extension of time to answer, but found neither of them in their office when he called, at 10 o'clock a. m.; that he was engaged in his office the balance of said day and did not have an opportunity to see said attorneys until the next morning, when he saw Johnson going to the Juneau wharf with his hand baggage; that he spoke to him and mentioned the fact that the time to answer had expired and wanted an extension, and that Johnson referred him to Heid, and that he soon after prepared a stipulation and went to Johnson and Heid's office, and, after he had stated that his client had been unexpectedly called to the State of Washington, and that he could not prepare an answer without his presence, the attorneys for the plaintiffs then and there refused to extend the time; that affiant then stated that unless they gave him time to answer by stipulation it would compel him to go to Sitka for an order of court for such extension; that thereafter, about 2.30 o'clock p. m., he saw the plaintiff Bonnifield, who

signed with defendant's attorneys a stipulation extending the time until the first of March, 1896; that it was then too late to reach the mail steamer, as the ferry-boat had gone to Douglas island; that his reasons for having Bonnifield sign the stipulation in person was that he had discharged his attorney, Malony, and no notice of substitution of any other attorney had been given; that upon the argument of the demurrer said Bonnifield was unrepresented by counsel, Johnson and Heid appearing for plaintiff Heid; that he is informed and believes that they have no authority to appear for Bonnifield, and that any action taken by them for him is unauthorized; that they have never advised defendant or his attorneys that they were authorized to act for Bonnifield, but, on the other hand, stated in open court that they were not so authorized; that the default was taken through mistake, inadvertence, and neglect, as above fully set forth; that he relied upon the stipulation with Bonnifield, and therefore did not go to Sitka to get an extension, and also relied upon the fact that the attorneys for plaintiff Heid, knowing full well that he intended to answer, would not attempt to take a default or judgment. He also states that the defendant has fully stated the facts in the case to affiant, and from such statement affiant believes that defendant has a good and substantial defense on the merits.

These allegations comprise all the testimony submitted by the defendant that is pertinent to the motion under consideration. Counter-affidavits were filed by each of the plaintiffs' attorneys, denying the allegation that they are not the attorneys for plaintiff Bonnifield and denying that they stated in open court that they were not authorized to represent him. The paramount question to be determined from this testimony is, Does it show such mistake, inadvertence, surprise, or excusable neglect as will warrant the court to set aside the default? Incidentally to this, the question as to whether plaintiff Bonnifield had an attorney of record when the stipulation of the 24th of December, 1895, extending the time, was made and the effect of such stipulation are presented. The incidental questions will be first disposed of.

The summons and complaint both bear the signatures of Johnson and Heid and J. F. Malony, plaintiffs' attorneys, and the complaint is verified by Bonnifield. Service of a notice of appearance for the defendant by his attorneys is admitted May 4th, 1895, by "J. F. Malony and Johnson and Heid, plaintiffs' attorneys," as is also an admission of service, of same date, of notice of motion to make more definite and certain. Service of the demurrer is admitted in the same manner, and in all the proceedings with reference to a writ of attachment and its discharge, subsequently occurring in the cause, notices are addressed by defendant's attorneys to "J. F. Malony and Messrs. Johnson and Heid, attorneys for plaintiffs." On the 19th day of November, 1895, the plaintiff Bonnifield served a written notice upon Malony discontinuing his services, which, however, was not filed until the 10th day of January, 1896, the day upon which all the papers having reference to this motion were filed. The record discloses no changes as to John-

son and Heid nor any proceedings for any change at all, as provided by statute, Hill's Code, sections 1042 and 1043, pages 668 and 669. Upon the record, then, as it appeared upon the 26th day of December, 1895, the day the default was entered, the same attorneys who signed the original summons and complaint were still the attorneys for the plaintiffs. An inference might be suggested from the affidavit submitted in behalf of the defendant that Malony was the attorney for the plaintiff Bonnifield only, and that Johnson and Heid were the attorneys for Heid only. The rule, however, is too well settled to need the citation of any authorities that a separate appearance must be so stated, and a general appearance for plaintiffs and defendants is an appearance by all the attorneys
57 jointly for all the clients; so that upon the record in the case, whatever the status of Malony may have been after he had been discharged by Bonnifield, Johnson and Heid were the attorneys of record for the plaintiffs upon the 24th day of December, 1895, when the stipulation in question was signed by Bonnifield.

There is no principle of practice better settled in our American law, that an appearance in court by an attorney for a client carries with it the presumption of authority to appear. This rule was early laid down by Chief Justice Marshal-, speaking for the Supreme Court of the United States in the case of Osborne *vs.* The Bank of the United States, 9 Wheaton, 739; Law. C. Co. ed., 204. The learned Chief Justice there says: "Certain gentlemen, first licensed by the Government, are admitted by order of court to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any State or of the Union." From the multitude of authorities affirming the rule here stated the following *has* been collated:

Hill *vs.* Mendenhall, 21 Wall. (U. S.), 453; Law. C. Co. ed., 616.
The American Ins. Co. *vs.* Oakley, 9 Paige (N. Y.), 496.
Kelso *vs.* Steiger (Md.), 24 Atl., 18.
Steffe *vs.* Old Colony R. Co. (Mass.), 30 N. E., 1137.
Banks *vs.* Fellows, 28 N. H., 302.
Taylor *vs.* New Orleans, 41 La. Ann., 891; 6 So., 723.
Norberg *vs.* Heineman, 59 Mich., 210; 26 N. W., 418.
58 Reynolds *vs.* Fleming, 30 Kan., 106; 1 Pac., 61.
Vorce *vs.* Page, 28 Neb., 294; 44 N. W., 452.
Garrison *vs.* McGowan, 48 Cal., 592.
Carter *et al. vs.* Koshland, 12 Or., 292; 8 Pac., 556.

The burden of proof rests upon him who denies the authority. Weeks on Attorneys, section 344.

The presumption of authority is not overcome by affidavit of opposing counsel challenging authority if the attorney appearing presents counter-affidavit asserting authority.

Ring *vs.* Vogle Paint and Glass Co., 46 Mo. App., 374.

And allegations of belief are not sufficient; facts must be stated.

Valle *vs.* Pickton, 91 Mo., 207; 3 S. W., 860.

It may be observed here that the absence of any testimony on the part of Bonnifield concerning the matter is quite significant, as it appears that he was in Juneau on the 24th day of December, 1895, when he signed the stipulation.

The practice is also well settled that the authority for an attorney to appear cannot be called into question except by motion directly for that purpose based upon affidavits showing in the first instance *prima facie* a want of authority, and upon the hearing such want must be established by clear and positive proofs. The proceeding may be by motion to vacate the appearance, to dismiss the action, or for an order requiring authority to be shown, and in cases where the validity of an order, judgment, or decree depends on the jurisdiction of the court over the person of a party, acquired solely by an appearance of attorneys, the authority of such attorney may be attacked upon a motion to vacate the order, judgment, or
59 decree. In the absence of some such proceeding directly challenging the authority the court will not hear or inquire into the question of the authority of the attorney for his appearance.

Hollins *vs.* St. Louis and C. R. Co., 32 (N. Y. S. R.), 230.
Mutual Life Ins. Co. *vs.* Penner, 43 (N. J. Eq.), 52; 10 Atl., 184.
Hill *vs.* Mendenhall, *supra.*
McKernon *vs.* Patrick, 4 How. (Miss.), 336.
Hare *vs.* Anderson, 12 (Ky. Law), 303; 14 S. W., 216.
Reynolds *vs.* Fleming, *supra.*
Williams *vs.* Uncompahgre Canal Co., 13 (Colo.), 469; 22 Pac., 806.
Affirmed in Rand *vs.* Dillon, 15 *idem.*, 372; 25 Pac., 185.
Winters *vs.* Means, 25 Neb., 241; 41 N. W., 157.
Turner *vs.* Caruthers, 17 Cal., 432.
People *vs.* Maripoosa County, 39 Cal., 683.

While under the authorities just cited this question is not regularly presented, I have been inclined to pass upon it for the purpose of settling the future practice in this court, and the conclusion reached is that the appearance by Johnson and Heid as plaintiffs' attorneys upon the summons and complaint is an appearance for both plaintiffs, and they ever since have been and now are such attorneys.

This brings us to the consideration of the stipulation made on the 24th of December, 1895, by and between Bonnifield, as plaintiff, and the attorneys for the defendant, extending the time to answer. The court has no doubt whatever that this stipulation must be dis-

regarded. The line of demarcation between the respective rights and powers of an attorney and client is clearly defined. The cause of action, the claim or demand sued upon, the subject-matter of the litigation are within the exclusive control of the client, and
60 the attorney may not impair, compromise, settle, surrender, or destroy them without the client's consent.

Holker *vs.* Parker, 7 Cranch (U. S.), 436.
Bates *vs.* Voorhies, 20 N. Y., 525.
Whitehall Township *vs.* Keller, 100 Pa. St., 45; Am. Rep., 361.
Dickinson *vs.* Hodges, 43 N. J. Eq., 45; 10 Atl., 111.
Moulton *vs.* Bowker, 115 (Mass.), 40.
Crotty *vs.* Eagles, adm'r (W. Va.), 13 S. E., 59.
Mitchell *vs.* Cotton, 3 (Fla.), 136.
Weathers *vs.* Roe, 4 Dana (Ky.), 474.
Peters *vs.* Lawson, 66 (Tex.), 336; 17 S. E., 734.
Repp *vs.* Wiles, (Ind. Appeals), 39 N. E., 441.
Martin *vs.* The Capital Ins. Co. (Ia.), 52 N. W., 534.
Heniman *vs.* Showman, 24 (Kan.), 387 : 36 Am. Rep., 261.
Stokes *vs.* Sheldon, 13 (Neb.), 207.
Moulton *vs.* Bowker, *supra.*

But all the proceedings in court to enforce the remedy, to bring the claim, demand, cause of action, or subject-matter of the suit to hearing, trial, determination, judgment, and execution are within the exclusive control of the attorney. "All acts, in and out of court, necessary or incidental to the prosecution or management of the suit and which affect the remedy only and not the cause of action," are to be performed by the attorney.

Moulton *vs.* Bowker, *supra.*
State *vs.* Hawkins, 28 (Me.), 366.
Cheever *vs.* Merick, 2 (N. H.), 376.
Anon., 1 Wendell (N. Y.), 109; Law Co. ed., 853.
Webb *vs.* Dill, 18 Abbott (N. Y.), 264.
Hughs *vs.* Hollingsworth, 1 Murph. (Tenn.), 146.
61 Thompson *vs.* Pershing, 86 (Ind.), 304.
Wilson *vs.* Spring, 64 (Ill.), 16.
Smith *vs.* Milliken, 2 (Minn.), 319.
Union Bank of Georgetown *vs.* Geary, 5 Peters (U. S.), 99, Law. C. Co. Ed., 60.

A foot-note to the latter case, published in vol. 30–33 of the Lawyers' Co-operative Company's Edition of the U. S. Supreme Court Reports, presents a voluminious citation of authorities as to what acts an attorney may perform in the progress of an action. The rule now under consideration has been followed by the courts of the Pacific States, and the supreme court of California has declared the rule in the following language: "A party to an action may appear in his own proper person or by attorney, but he cannot do both. If he appears by attorney he must be heard through him, and it is indispensable to the decorum of the court and the due

and orderly conduct of a cause that such attorneys shall have the management and control of the action, and his acts go unquestioned by any one except the party he represents. So long as he remains the attorney of record the court cannot recognize any other as having the management of the case. If the party for any cause becomes dissatisfied with his attorney, the law points out a remedy. He may move the court for leave to change his attorneys. Until that has been done the client cannot assume control of the case. While there is an attorney of record, no stipulation as to the conduct or disposal of the action should be entertained by the court unless the same is signed or assented to by such attorneys. Such a rule is not only indispensable to the orderly conduct of the cause, but is likewise a safeguard to the client against the intrigues of his adversary. Moreover (without being understood as making
62 any reference to the present case), it is proper to add that to entirely ignore the attorney of record and enter, without his consent, into a secret negotiation with his client touching the management of his case is unbecoming the dignity of the profession and is destructive of that courtesy which is due from one member to another." Board of Commissioners *vs.* Younger, 29 Cal., 147. The doctrine here laid down has been repeatedly reaffirmed by the supreme court of the State. The rule now under consideration has also received the weight of legislative sanction. The statutes of Oregon provide: "That where a party appears by attorney, the written proceedings must be in the name of the attorney, who is the sole representative of his client as between him and the adverse part-." Hill's Code, section 1032, page 680.

A stipulation extending the time to answer is certainly one of the proceedings in or incident to the progress of a cause pending in court, and, as Bonnifield was represented by attorneys when the stipulation was made, his action cannot be recognized by the court.

Additional force is given to the imp-rtance of this rule when it is considered that Bonnifield has a coplaintiff. The action on the part of the plaintiffs is joint, and upon the cause of action set out in the complaint both must recover or neither. The right to a default on the part of the plaintiffs was a vested one on the 24th day of December, 1895, and on that day one plaintiff refuses to waive the right and the other stipulates to do so. Who is to have his way? This dilemma exemplifies in a striking manner the inextricable confusion into which judicial proceedings would be thrown if clients and not their attorneys were permitted to control and manage causes in court. The stipulation, therefore, must be held for naught.

Upon the main question the court is not satisfied from the
63 showing presented that there is such mistake, inadvertence, surprise, or excusable neglect as will justify the vacation of this default. It appears from the affidavits submitted on the part of the defendant that, although the defendant's attorneys had been under the impression that they had sixty days to answer, they did learn from their office docket on the morning of the 23rd of December, 1895, that the time to answer expired that day. After learning this they could not have labored under any mistake, inadvertence,

or surprise concerning the time to answer. The only step taken that day to guard against the default was a call at the office of the plaintiffs' attorneys at 10 o'clock that forenoon, and they were not found. About 10 o'clock the next morning, and after the right to a default had accrued, the affiant met Mr. Johnson on the street with his hand baggage, going to the Juneau wharf, apparently on his way to take the regular mail steamer, which was then at Douglas island, bound thence for Sitka. Here a conversation took place concerning an extension of time, and Mr. Johnson referred the affiant to Mr. Heid. A call on Mr. Heid was immediately made and the extension was refused. Affiant testifies that he stated at this time that unless an extension was granted he would be compelled to go to Sitka and ask the court for further time; but nothing further was done except to obtain the stipulation from Bonnifield about 2.30 o'clock p. m., at which time, it appears, the steamer was still at Douglas island. Although the ferry had then left Juneau, there certainly must have been an opportunity between 10 o'clock a. m. and 2.30 o'clock p. m. for counsel for defendant to reach the steamer. Mr. Johnson reached her after the conversation on the street occurred, came to Sitka by her, and, on the 26th of
64 December, 1895, took his order for default. The court feels constrained to add that a like diligence on the part of counsel for defendant would have prevented the entry of the order.

It further appears from the showing presented in behalf of the defendant that he had fully stated the facts in the case to his attorneys, and upon such statement they had advised him that he had a good and substantial defense on the merits. Attorneys for the defendant were, then, in the position on the 23rd day of December to prepare and, in the absence of their client, verify and serve an answer. That counsel were engaged in their office or did not have an opportunity to see the attorneys for the plaintiff *are* not a sufficient excuse. Neither can any reliance which defendant's attorneys may have placed in any knowledge of opposing counsel as to defendant's intention to answer be considered. Defendant's attorneys may have been, and doubtless were, disappointed that their request for an extension was refused; and under the amenities and courtesies which are usually exchanged among the gentlemen of the bar it would seem that the request might have been granted; but the question for the court to determine is one of law and not of professional ethics, and, on the showing made by the defendant, the case is not one of such mistake, inadvertence, surprise, or excusable neglect as the law contemplates.

Butler *vs.* Morse (N. H.), 23 Atl., 90.
Crig *vs.* Worth, 47 (Md.), 281.
Skinner *vs.* Terry, 107 (N. C.), 103; 12 S. E., 118.
Landa *vs.* McGehee (Tex.), 19 S. W., 516.
Baltimore O. and C. R. Co. *vs.* Flynn (Ind. App.), 28 N. E., 201.
Devenbaugh *vs.* Nifer (*idem*), 29 N. E., 923.
Elton *vs.* Brettschneiber, 23 Ill. App., 355.
65 Elder *vs.* The Bank of Lawrence, 12 Kan., 242.

Haggin *vs.* Lorens, 13 Mont., 406; 34 Pac., 707.
Thomas *vs.* Chambers, 14 *idem*, 423; 36 Pac., 814.
City of Helena *vs.* Brule, 15 *idem*, 429; 39 Pac., 456.
S. C. Herbst Importing Co. *vs.* Hogan, 41 Pac., 135.
Blaine *vs.* Briscow, 41 Pac., 1002.
Jenkins *vs.* Gamewell Fire, etc., Co., Cal., 31 Pac., 570.
Shearman *vs.* Jorgenson, 106 Cal., 483; 39 Pac., 863.
Harbaugh *vs.* Honey Lake Co., 41 Pac., 792.
Myers *vs.* Landrum, 4 (Wash.), 762; 31 Pac., 53.
Haines *vs.* Schwartz, 5 *idem*, 453.
Deering *vs.* Quivey, 26 Or., 566; 38 Pac., 710.

It follows from these views that the motion to vacate the default must be denied, and the plaintiffs will have judgment in accordance with the demand of the summons and complaint.

Dated Sitka, January 25, 1896.

By the court:

ARTHUR K. DELANEY, *Judge.*

(Endorsed:) No. 439. In U. S. district court, district of Alaska. S. A. Bonnifield and John G. Heid, pl'ffs, *vs.* Willis Thorp, def't. Opinion. Filed Jan. 25, 1896. Charles D. Rogers, clerk.

* * * * * * *

66 And afterwards, to wit, on the said 25th day of January, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

In this cause defendant's motion to open default, granted herein on December 26, 1895, having been submitted without argument by stipulation of parties, and the court, now being fully advised in the premises, denies said motion and directs that judgment be entered for plaintiffs in accordance with the written opinion on file herein.

And afterwards, to wit, on the said 25th day of January, 1896, the following further proceedings were had and appear of record in said cause, which are in words and figures following, to wit:

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } Judgment by Default.

In this action, the defendant, Willis Thorp, having been duly and regularly served with summons and copy of the complaint filed herein, and after demurrer of defendant to complaint herein having been overruled by the court, defendant has failed to appear

and answer the complaint of plaintiff filed herein, and the legal time for answering the said complaint having expired and no other pleading having been filed, the default of the said defendant,
67 Willis Thorp, in the premises having been duly entered according to law:

Now, at this day, on application of Johnson & Heid, attorneys for plaintiffs, it is hereby ordered that judgment be entered herein against the said defendant, Willis Thorp, in accordance with the prayer of said plaintiffs' complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed that S. A. Bonnifield and John G. Heid, plaintiffs, do have and recover of and from the said defendant, Willis Thorp, the sum of seven thousand two hundred thirty-one and $\frac{25}{100}$ dollars ($7,231.25), lawful money of the United States of America, with interest thereon, at the rate of eight per cent. per annum, from the date hereof until paid, together with said plaintiffs' costs and disbursements incurred in said action, amounting to the sum of $33.55.

And it is further ordered, adjudged, and decreed that said plaintiffs do have execution against the property of the said defendant.

Dated January 25, 1896.

By the court:

ARTHUR K. DELANEY, *Judge.*

68 And afterwards, to wit, on the said 10th day of February, 1896, the defendant filed the following notice of motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice of Motion.

You and each of you will please take notice that the defendant, by and through his attorneys, Messrs. Bostwick & Crews, will move before the Honorable Arthur K. Delaney, judge of the district court of the United States for the district of Alaska, at the court-house, in Sitka, Alaska, on the arrival of the next mail steamer, City of Topeka, on or about the 9th day of February, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment heretofore granted and entered in this cause in favor of the plaintiffs and against the defendant on, to wit, January 25, 1896, for the sum of seven thousand two hundred sixty-four
69 and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon the said judgment.

Also for an order permitting and allowing the defendant to file his answer; which is herewith presented, duly verified.

That said motion is based upon the verified answer of said de-

fendant and upon all the files, records, papers, and proceedings had and done in said cause.

Dated Juneau, Alaska, January 29, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson and Heid, attorneys for John G. Heid and S. A. Bonnifield, plaintiffs.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice of motion. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within notice received and due service of the same acknowledged this 29th day of January, 1896. Johnson & Heid, attorneys for plaintiffs.

70 And afterwards, to wit, on the 10th day of February, 1896, the defendant filed the following motion, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Motion.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick & Crews, and moves the court for an order vacating, setting aside, and holding for naught the judgment heretofore granted and filed in this cause, in favor of the plaintiffs and against the defendant, on, to wit, January 25th, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon said judgment.

Also for an order staying, setting aside, and holding for naught any and all subsequent proceedings had by the plaintiffs on account of said judgment.

Also for an order permitting and allowing the defendant to file his answer in this cause.

This motion is based upon the verified answer of the defendant and upon all the files, records, and proceedings had and done in the foregoing-entitled cause.

Dated Juneau, Alaska, January 29th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

71 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Motion. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys

for defendant. Copy of within motion received and due service of the same acknowledged this 29th day of January, 1896. Johnson & Heid, attorneys for plaintiffs.

72 And afterwards, to wit, on the 10th day of February, 1896, the defendant filed his answer in said cause; which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Answer.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick and Crews, and for answer to the plaintiffs' complaint herein admits, denies, and alleges as follows:

I.

Defendant, answering paragraph one of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

II.

Defendant, answering paragraph two of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

III.

Defendant, answering paragraph three of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained; and defendant denies specifically that on the 7th day of May, 1894, or at any other time or at all, that Al. Runkle and S. A. Bonnifield sold, transferred, and assigned to John G. Heid, one of the plaintiffs herein, for a good and valuable consideration, an undivided one-eighth ($\frac{1}{8}$) interest in and to the lease of the
73 Aurora Lode claim, which lease is referred to in plaintiffs' complaint herein and made a part thereof, with the consent of William M. Bennett.

IV.

Defendant, answering paragraph four of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

V.

Defendant, answering paragraph five of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained; and defendant specifically denies that on the 26th day of June, 1894, the plaintiffs, S. A. Bonnifield and John G. Heid, with the consent of William M. Bennett, entered into an agreement

with the defendant, Willis Thorp, by which it was agreed between the parties that, in consideration of said assignment of their right, title, and interest in and to the said premises referred to in plaintiffs' complaint herein, the said Willis Thorp, the defendant herein, was to work and operate the said Aurora Lode claim under said written lease or otherwise except as hereinafter alleged.

VI.

Answering paragraph six of plaintiffs' complaint, defendant denies said paragraph and each and every allegation therein contained; and defendant denies specifically that on the 26th day of June, 1894, or at any other time he entered into an agreement with the plaintiffs herein whereby he agreed to make payment of the mortgage on said Aurora Lode claim held by Robert Duncan, Jr., and J. Parker Corbus, or that he agreed upon that date or at any other time to pay off or assume to pay all and every claim
74 standing against the said premises contracted by the plaintiff S. A. Bonnifield and Al. Runkle; and the said defendant denies specifically that he agreed to mine, work, and operate said premises, and after making all the payments in said lease mentioned, to wit, the mortgage held by Robert Duncan, Jr., and J. Parker Corbus, and assume to pay their debts, that he would divide the profits or any proceeds arising from the operation of said mine and premises, giving to S. A. Bonnifield seven-sixteenths ($\frac{7}{16}$), to John G. Heid two-sixteenths ($\frac{2}{16}$), and retain the balance, seven-sixteenths ($\frac{7}{16}$), himself, or made any other agreement except as hereinafter alleged.

VII.

Defendant, answering paragraph seven of plaintiffs' complaint herein, denies said paragraph and each and every allegation therein contained. Defendant specifically denies the allegation in said paragraph that in the mining and operation of said Aurora Lode claim that he extracted and took therefrom gold of the value of thirty-two thousand dollars ($32,000.00), or that he took out ore to the amount of thirty-five hundred dollars ($3,500.00) and disposed of the same, but, on the contrary, alleges that the entire output of said mine during the time the same was worked, operated, and conducted by defendant did not exceed the sum of thirty thousand dollars ($30,000.00).

VIII.

Defendant, answering paragraph eighth of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained, and defendant alleges that the total cost and expense of operating and conducting said mine, under the lease referred to, was the sum of thirty-five thousand two hundred and sixteen
75 dollars ($35,216.00).

IX.

Defendant, answering paragraph nine of plaintiffs' complaint, denies said paragraph and each and every allegation therein contained.

Defendant, further answering, and for an affirmative answer and counter-claim, alleges—

That on or about the — day of ——, 189–, the plaintiffs being and then representing to defendant that they were the lessees of that certain mining claim known as the Aurora Lode mining claim, situate in Silver Bow basin, Harris mining district, district of Alaska, and that by reason of the foreclosure of a certain mortgage then held by Robert Duncan, Jr., and J. Parker Corbus they were restrained from operating said mine; that they had no means wherewith to operate the same; that there were other and divers claims against said mine, and that if defendant would pay off the claims, to wit, the mortgage aforesaid and the other claims then pending, that they, the said plaintiffs, would assign to the said defendant the said lease for the mining season of 1894.

That in consideration of said assignment the said defendant was to operate said mine, and out of the net profits thereof pay off the various claims, including the aforesaid mortgage, and *of* the residue of the net profits arising from the operation of said mine, if any there was, should be divided between the plaintiffs and this defendant at the proportion of nine-sixteenths ($\frac{9}{16}$) to be turned over — the said plaintiffs and seven-sixteenths ($\frac{7}{16}$) to be held and retain- by this defendant.

That pursuant to said oral agreement and understanding this defendant went into the possession of said mine and operated the same during the said mining season of 1894.

76 That after paying off the mortgage as aforesaid and other outstanding claims against said mine and the expense of operating and mining said property there *was* no net profits left, but, on the other hand, this defendant paid out and expended in the operation and expense of mining said property and the payment of said claims the sum of thirty-five thousand two hundred sixteen dollars ($35,216.00).

That the total yield from said mine from all of the ore extracted therefrom and otherwise amounted to the sum of thirty thousand dollars ($30,000.00).

That by the terms of said oral agreement aforesaid the plaintiffs were to share and stand their proportion of any loss in the operation of said mine in the same ratio as they were to receive the profits if any were made in the operation of the same.

Therefore by reason of the premises the plaintiffs became indebted to the defendant in the sum of two thousand nine hundred and thirty-four dollars ($2,934.00).

Wherefore defendant prays judgment against the plaintiffs in the sum of two thousand nine hundred thirty-four dollars ($2,934.00).

Juneau, Alaska, February 5th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

UNITED STATES,
District of Alaska, } ss:

Willis Thorp, being first duly sworn, on oath says that he is the defendant in the above-entitled action; that he has heard the foregoing answer read, knows the contents thereof, and believes the same to be true.

WILLIS THORP.

Subscribed and sworn to before me this 5th day of February, A. D. 1896.

77 HARRISON BOSTWICK,
[L. S.] *Notary Public.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Answer. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

And afterwards, to wit, on said date, the defendant filed the following notice and affidavit, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Notice.

You and each of you will please take notice that the affidavit a copy of which is hereto annexed will be used by the defendant upon the motion heretofore served upon you to vacate and set aside the judgment obtained in the foregoing-entitled cause on, to wit, January 25th, 1896.

Dated Juneau, Alaska, January 30th, 1896.

BOSTWICK AND CREWS,
Defendant's Attorneys.

To Messrs. Johnson & Heid, attorneys for John G. Heid.

In the District Court of the United States for the District of Alaska.

78 S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439.

I, S. A. Bonnifield, being the principal plaintiff in the above-entitled cause and the owner, as appears from the complaint on file in said cause, of seven-eighths (⅞) of the judgment rendered in this cause on the 25th day of January, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), which said judgment was had by default, hereby declare that said judg-

ment is erroneous in this, that the same is too large and for more than is actually due. These facts fully appeared to me subsequent to the signing of said complaint after an investigation and calculation of the accounts, bills, etc., in the hands of the defendant, Willis Thorp; that said judgment should not be for a greater sum than ($800.00) eight hundred dollars.

And as such principal creditor and owner of seven-eighths (⅞) of said judgment I am willing that said judgment so rendered by default, as aforesaid, be set aside and defendant have an opportunity to answer, or that the same be amended so as to be for the amount above set forth, which I hereby assert to be the true amount to be recovered in this cause, and that I make this statement on my own responsibility and for myself, that justice may be done in the premises.

Dated Juneau, Alaska, January 28th, 1896.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 28th day of January, 1896.

[L. S.] HARRISON BOSTWICK,
Notary Public.

79 (Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavit of S. A. Bonnifield. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within affidavit & notice received and due service of the same acknowledged this 30th day of January, 1896. Johnson & Heid, attorneys for pl'ffs.

And afterwards, to wit, on said date, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice to Attorneys.

You and each of you will please take notice that I have this day settled all of my differences with the defendant, Willis Thorp, in the foregoing-entitled cause; that I have received full satisfaction of the judgment rendered in said cause on, to wit, January 25th, 1896, so far as my seven-eighths (⅞) interest therein is concerned.

That I have endorsed upon the execution issued upon said judgment out of the above-entitled court on, to wit, January 25th, 1896, full satisfaction and settlement of my seven-eighths (⅞) interest in and to said judgment, and have directed the United States marshal for the district of Alaska to take no more proceedings
80 under said execution on account of any sums due me in said judgment; that I have directed the United States mar-

shal for the district of Alaska to return said execution to the court from which the same was issued fully satisfied so far as my judgment is concerned.

You will, therefore, each take notice that I do not wish you to any longer represent me in the foregoing-entitled cause; that your employment by me in said cause is by me this day terminated and at an end, and you will from the date of the service of this notice upon you take no further steps for me as my attorneys in said cause.

You will hereby further take notice that any act or acts, proceeding or proceedings, had or done by you in said cause for or on my behalf after the date of the service of this notice upon you is absolutely unauthorized by me and against my express authority, and any act or acts done by you will be, so far as I am concerned, absolutely void.

Dated Juneau, Alaska, February 1st, 1896. Executed in triplicate.

S. A. BONNIFIELD.

To Messrs. Johnson & Heid, attorneys-at-law, Juneau, Alaska.

Copy of foregoing this day acknowledged. Feb. 1st, 1896.
JOHNSON & HEID.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Discharge of attorneys. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

81 And afterwards, to wit, on said date, the defendant filed the following notice and affidavit, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Notice.

You and each of you will please take notice that affiant will use the affidavit a copy of which is herewith served upon you upon his motion to vacate and set aside the judgment heretofore rendered in this cause at the time and place mentioned and set forth in said notice of motion and motion.

Dated Juneau, Alaska, February 5th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson and Heid, attorneys for John G. Heid.

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Affidavit.

UNITED STATES,
District of Alaska, } *ss:*

82 S. A. Bonnifield, being first duly sworn, upon oath says:

I.

That he is one of the plaintiffs in the foregoing-entitled cause.

II.

That affiant's attorney employed by him in said cause and who exclusively represented his interests therein up to the 13th day of November, 1895, was John F. Malony, at which time affiant discharged said John F. Malony.

III.

That up to that period affiant had not employed Messrs. Johnson and Heid to represent him in said cause, and any papers signed by them as his attorneys was unauthorized by him and was presumptious on their part; that when the demurrer filed in this cause by the defendant was called on to be heard before Honorable Warren Truitt, affiant was not represented by counsel; that he had then discharged John F. Malony and had not employed counsel to represent him, and upon such statement made by affiant to the court the hearing on said demurrer was continued for one day; that affiant in the meantime did employ Messrs. Johnson and Heid to represent his interest in said cause.

IV.

That on the 24th day of December, 1895, John G. Heid came to plaintiff'- rooms and stated to affiant that Bostwick had been in their office asking for time to answer in this action on the part of the plaintiff Heid, and that he, Heid, had refused to give him any time; that said Heid then and there requested affiant not to sign any stipulation giving defendant time to answer; that said Heid said to affiant that they intended to take snap judgment against the defendant Thorp.

83 V.

That subsequently and at 2.30 o'clock of December 24th, 1895, affiant called at the law office of Bostwick and Crews to see Mr. Bostwick about some matters other than the present suit, and during his stay there affiant was requested by Bostwick to sign a stipulation giving the defendant until March 1st, 1896, in which to answer; that said Bostwick stated to affiant that Heid had refused to sign the stipulation, and that unless affiant signed the stipulation he would be compelled to go to Sitka and obtain an order from the

court giving the defendant additional time to answer; whereupon affiant very gladly and willingly, and without any statement or representation from said Bostwick, signed the stipulation, giving the defendant until March 1st, 1896, in which to serve and file their answer; that prior to signing stipulation affiant and defendant had been negotiating for settlement of this cause, and affiant had agreed to take in satisfaction of his claim the sum finally agreed upon; and affiant further states that he had discussed the matter with John G. Heid and they had both agreed that the amount claimed in their complaint was more than was actually due.

VI.

That, in signing said stipulation giving defendant additional time to answer, affiant thought he was doing right, and he believed and still believes he had a right so to do; that affiant did not think it proper or just to take advantage of the defendant or his attorneys and was perfectly willing to and always has been that the defendant should have a right to defend said action in court.

VII.

84 Affiant further states that the amount of damages set forth in their complaint herein was only estimated; that affiant never had an opportunity to see the books, receipts, and papers in connection with the operation and conduct of said mine under the lease mentioned and set forth in plaintiffs' complaint herein; that subsequent thereto and on, to wit, December 24th, 1895, Charles Sumner Johnson, of the firm of Johnson and Heid, went to Sitka and there obtained a- order of default against the defendant Thorp; that the action of said Charles Sumner Johnson in taking said default was unauthorized and unwarranted and against affiant's wishes in the premises; that the default taken on said day should be vacated and set aside and the defendant given an opportunity to file his answer.

VIII.

That subsequently thereto and on, to wit, January 25th, 1896, Messrs. Johnson and Heid went to Sitka and there obtained a default judgment against the defendant for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs, and thereupon caused an execution to be issued thereon.

IX.

Affiant further states that the obtaining of said judgment by default was unauthorized on his part; that said judgment is erroneous inasmuch that the amount therein set forth is too large; that subsequently to the obtaining of said judgment, on, to wit, January 28th, 1896, affiant made a thorough and careful examination of the books kept by defendant during the operation and conduct of said mine, under the lease mentioned and set forth in plaintiffs' complaint herein; that affiant examined all of the vouchers and
85 receipts for money paid out in the operation and conduct of said mine; that affiant examined all of the vouchers show-

ing the output of said mine during his operation and conduct of the same, and that the amount due plaintiffs under said contract from the defendant, as estimated by affiant, was the sum of eight hundred dollars ($800.00) and no more; that, in view of these facts, affiant thereupon and on, to wit, January 28th, 1896, had a full, final, and complete settlement of all his matters and differences with the defendant growing out of the lease and contract mentioned and set forth in plaintiffs' complaint herein, and thereupon received a full and complete settlement and satisfaction for the amount due him, to wit, seven-eighths (⅞) of the judgment obtained in this cause on the 25th day of January, 1896; that affiant thereupon executed a full and complete satisfaction of all his right, title, and claim in and to said judgment, to wit, seven-eighths (⅞) thereof.

That affiant also, on the said 28th day of January, 1896, caused to be endorsed upon the execution issued in said cause upon said judgment a full, complete satisfaction and payment of all moneys due him on said execution on account of said judgment, and directed the United States marshal for the district of Alaska to take no further proceedings under said execution on account of the said judgment due affiant, and further instructed and directed said marshal to return said execution to the clerk of the district court of the United States for the district of Alaska fully paid and satisfied so far as affiant's portion of said judgment is concerned.

X.

That thereafter and on, to wit, January 29th, 1896, affiant called personally at the office of Messrs. Johnson and Heid and in-
86 formed them that he had had a full settlement of all his matters and differences with the defendant, Willis Thorp, and that he had received *sta*isfaction of his portion of said judgment, and that he had signed release and satisfaction of said judgment, and that he had also endorsed upon the execution, then in the hands of the United States marshal, full satisfaction of all sums due him on account of said judgment, and that they need not appear for him further in the matter.

That subsequently thereto and on, to wit, February 1, 1896, affiant caused a written notice to be served upon Messrs. Johnson and Heid discharging them from any further service in said cause.

S. A. BONNIFIELD.

Subscribed and sworn to before me this 8th day of February, 1896.

HARRISON BOSTWICK. [L. S.]
Notary Public for Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavit of S. A. Bonnifield and notice. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within affidavit and notice received and due service of the same acknowledged this 8th day of February, 1896. Johnson and Heid, attorneys for John G. Heid.

87 And afterwards, to wit, on the same date, the defendant filed the following notice and affidavits, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Notice.

You and each of you will please take notice that the affidavits a copy of which is herewith served upon you, will be used by the defendant upon his motion to vacate and set aside the judgment heretofore rendered in this cause at the time and place mentioned and set forth in said notice of motion and motion.

Juneau, Alaska, February 5th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson & Heid, attorneys for John G. Heid.

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Affidavit.

UNITED STATES,
District of Alaska, } *ss*:

88 I, W. E. Crews, being first duly sworn, upon oath depose and say that I am a member of the law firm of Bostwick and Crews, and that as such member I had full charge and control of the affairs and litigation of Willis Thorp, who is a client of our office. It therefore fell upon me to present in the district court of the United States for the district of Alaska and argue the demurrer of Willis Thorp filed to plaintiffs' complaint in the foregoing-entitled cause; that at the time said demurrer was called for argument in the aforesaid court Mr. Malony announced to the court that while he had previously represented Mr. S. A. Bonnifield that he had been discharged, and that he could not further appear for said Bonnifield in the above-entitled cause; that Messrs. Johnson and Heid were in the court-room at that time, either of whom refused to appear for Mr. Bonnifield in said cause, saying they had no authority so to do; whereupon the court adjourned the said cause until the next day at 10 o'clock, in order that the said S. A. Bonnifield have an opportunity to secure counsel, at which time said cause came on for hearing. Mr. C. S. Johnson, of the firm of Johnson and Heid, announced that he had been employed by Mr. Bonnifield to argue the demurrer, at which time the said demurrer was argued, submitted, and overruled.

That at the time of overruling of said demurrer, the court being

near an end, affiant announced his intention to the members of the bar to take a trip abroad, to wit, to the State of Oregon, to be gone about six weeks, and asked that in all cases in which pleadings were due on his behalf be continued for sixty (60) days, which was granted in the five cases then upon the calendar in which Mr. Malony was interested; that Messrs. Johnson and Heid refused to grant more than twenty (20) days in the aforesaid cause.

89 That the fact of Mr. Johnson's employment in the presentation of the demurrer of the defendant was not reported by affiant to Mr. Bostwick; neither was he in the court-room at the time.

Affiant further states that he reported to Harrison Bostwick, his partner, that in all cases in which they were interested that pleadings would not be due until sixty days; that such time had been granted in which to plead. The above case, however, was noted on the office docket by the clerk of the said firm of Bostwick and Crews, saying that answer would be due in twenty (20) days, in accordance with the order of this court and consent of counsel.

That all matters in the above-entitled cause, so far as our firm are concerned, prior to this time have been attended to exclusively by affiant.

W. E. CREWS.

Subscribed and sworn to before me this 4th day of February, 1896.

[L. S.] HARRISON BOSTWICK,
Notary Public for Alaska.

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiff-,
vs.
WILLIS THORP, Defendant. } No. 439. Affidavit.

UNITED STATES,
District of Alaska, } *ss:*

Harrison Bostwick, being first duly sworn, upon oath says that on the morning of the 24th of December, 1895, when affiant

90 was talking to C. S. Johnson, at the time referred to in affiant's former affidavit herein, that he was on his way to the Juneau wharf, and affiant asked said Johnson for further time to file his answer in this case, and said Johnson did not intimate to affiant that he was going to Sitka, or that he would take default or other order in this cause, but referred affiant to his partner, John G. Heid, and affiant was led to believe and did believe from his conversation with said Johnson and Heid that they did not intend to take any default in this case.

II.

That after having this conversation with Messrs. Johnson and Heid affiant obtained the stipulation from the plaintiff Bonnifield,

who is the principle creditor in this cause, and affiant believed that the stipulation from the principle creditor and plaintiff Bonnifield was good in law and was sufficient to give defendant additional time in which to answer and prevent judgment taken by default, and affiant relied implicitly on the above facts, and therefore did not go to Sitka to obtain an order of the court extending the time in which to answer and prevent judgment by default in this cause.

HARRISON BOSTWICK.

Subscribed and sworn to before me this 6th day of February, 1896.

F. D. KELSEY,
[L. S.] *Notary Public for Alaska.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Affidavits of Harrison Bostwick *et al.* Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of the within affidavits & notice received and due service of the same acknowledged this 8th day of Feb'y, 1896. Johnson & Heid, attorney- for pl'ff-.

91 And afterwards, to wit, on said date, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

In this cause defendant's motion for an order setting aside the judgment granted herein on January 25, 1896, coming on regularly to be heard, plaintiff and defendant each being represented by counsel, and after hearing argument of counsel, and the court, being fully advised in the premises, denies said motion; but if there is a mistake in the computation as to the amount of judgment, it may be corrected in that regard, and plaintiffs are given until the arrival of the next steamer, City of Topeka, on or about February 25th, 1896, to file affidavit to show no error exists in said judgment; to which ruling of the court the defendant at the time excepts.

And afterwards, to wit, on said date, the following satisfaction of judgment was filed by the defendant, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, vs. WILLIS THORP, Defendant. | No. 439. Satisfaction of Judgment.

I, S. A. Bonnifield, for and in consideration of the sum of eight hundred dollars ($800.00), gold coin of the United States,
92 to me in hand paid by Willis Thorp, the defendant in the above-entitled action, — full and complete satisfaction is hereby acknowledged of all my right, title, and interest in and to that certain judgment (same being seven-eighths (⅞) thereof) rendered in the United States district court for the district of Alaska, in the above-entitled action, on the 25th day of January, 1896, in favor of the plaintiffs therein and against the defendant, Willis Thorp, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80) and costs; which said judgment is recorded in Book — of Judgments, at page —.

And I hereby authorize and direct the clerk of said court to enter satisfaction of said judgment to the extent aforesaid of record of said judgment in this action.

Dated Juneau, Alaska, this 28 day of January, 1896.

S. A. BONNIFIELD.

UNITED STATES, *District of Alaska*, } ss:

This certifies that on this 28th day of January, 1896, before me, the undersigned, notary public in and for the district of Alaska, duly commissioned and sworn, personally appeared the above-named S. A. Bonnifield, who is personally known to me to be the party subscribing the foregoing instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

HARRISON BOSTWICK,
[L. S.] *Notary Public for Alaska.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Satisfaction of judgment. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

93 And afterwards, to wit, on the 10th day of February, 1896, the defendant filed his petition for a writ of error, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Petition for Writ of Error.

In the Circuit Court of Appeals for the Ninth Judicial District.

To the Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska:

The petition of Willis Thorp respectfully shows to this honorable court as follows:

That your petitioner is the defendant in the above-entitled cause; that in said cause there was entered at a term of court held at Sitka, Alaska, on January 25th, 1896, a final judgment for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), greatly to the prejudice and injury of your petitioner; which said judgment and proceedings incident thereto are erroneous in many particulars, to the great injury and prejudice of the complainant, your petitioner.

That manifest errors have been made in this cause in the rendering of said judgment to the great damage of this complainant, your petitioner, as same fully appears from the bi l of exceptions filed in said cause and assignment of errors filed herewith.

94 Wherefore, that in order for your petitioner to obtain relief in the premises and for an opportunity to show the errors complained of, your petitioner prays that he may be allowed a writ of error in said cause, and that upon the giving by your petitioner of a bond, as by law required, all proceedings in this court be suspended and stayed until the determination of said writ of error in the United States circuit court of appeals for the ninth judicial district.

And that a transcript of the records, proceedings, and all papers in this cause, duly authenticated, may be transmitted to the honorable circuit court of appeals for the ninth judicial circuit, holding terms in San Francisco, State of California, to determine said writ of errors.

Dated Juneau, Alaska, January 29, 1896.

WILLIS THORP, *Petitioner.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Petition for writ of error. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

95 And afterwards, on said date, the defendant filed his assignment of errors, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Assignment of Errors.

Comes now the said defendant, Willis Thorp, in error, in the above-entitled cause, by Messrs. Bostwick and Crews, his attorneys and solicitors, and says that in the record and proceedings in the above-entitled cause there is manifest error in this:

I.

Because the court erred in overruling defendant's general demurrer to plaintiffs' complaint; to which overruling to said demurrer the defendant then and there excepted, and his exceptions were duly allowed by the court.

II.

Because the court erred in granting the plaintiffs' default for want of an answer in the above-entitled cause for the reason that the plaintiffs never notified the defendant or his counsel, by notice or otherwise, that they intended to apply for said default.

III.

Because the court erred in refusing to set aside the default, granted, as aforesaid, upon the application and showing made by the defendant, Willis Thorp.

IV.

96 Because the court erred in granting judgment on said default:

First. For the reason that no proof was offered in support of the allegations of plaintiffs' complaint.

Second. That there was no application or motion for judgment on said default filed by the plaintiffs, and that the defendant had no notice of the intention of the plaintiffs to apply for or the court granting said judgment, and there was no application in writing, by motion or otherwise, asking for judgment on said default.

V.

The court erred in entering judgment in this cause in favor of the plaintiffs; which said judgment was entered on the 25th day of January, 1896.

VI.

Because the court erred in refusing to deny defendant's motion to open up and set aside the said judgment on the showing made in support of said motion, as shown by the files, records, and proceedings in said cause.

Wherefore the said Willis Thorp prays that the judgment of the United States for the district of Alaska be reversed, and the said

district court be ordered to open up said default and said judgment and to reverse the judgment of said court in overruling defendant's demurrer, and that the defendant have such other and further relief as he is entitled to under the law.

HARRISON BOSTWICK,
W. E. CREWS,
Attorneys for Plaintiff in Error,
Willis Thorp, Juneau, Alaska.

UNITED STATES, *District of Alaska,* } *ss:*

97 I, Louis L. Williams, U. S. marshal for the district of Alaska, hereby certify that on the 10th day of February, 1896, at Sitka, Alaska, I served a certified copy of the within assignment of errors, as furnished by defendant's attorneys, on C. S. Johnson by delivering same to him.

Dated Sitka, Alaska, February 10th, 1896.

LOUIS L. WILLIAMS,
U. S. Marshal,
By W. H. McNAIR, *Deputy.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Assignment of errors. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

98 And afterwards, on said date, the following further proceedings were had in said cause, which are in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Order Allowing Writ of Error.

This 10 day of February, 1896, came the defendant, Willis Thorp, by his attorneys, Messrs. Bostwick and Crews, and filed herein and presented to the court his petition, praying for an allowance of the writ of error intended to be urged by him, praying also that a transcript of the records, proceedings, and papers upon which the judgment herein was rendered, together with all other papers, records, and files in said cause, duly authenticated, may be sent to the United States circuit court of appeals for the ninth judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the court does allow the writ of error upon the defendant giving a bond, according to law, in the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80),

together with and including just damages of delay, costs, and interest on this writ, which shall operate as a supersedeas bond.

Done in open court, at Sitka, Alaska, this 10th day of February, 1896.

ARTHUR K. DELANEY,
Judge of the U. S. District Court for the District of Alaska.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Order allowing writ of error. Filed February 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

99 And afterwards, on said date, the defendant filed his bond on writ of error, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Bond on Writ of Error.

Know all men by these presents that we, Willis Thorp, as principal, and Charles W. Young, John Olds, J. D. Matthus, J. G. Peterson, and Emery Valentine, as sureties, are held and firmly bound unto the plaintiffs herein, S. A. Bonnifield and John G. Heid, in the full and just sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), with interest thereon at the legal rate, with costs and expenses of this appeal, to be paid to the said plaintiffs, S. A. Bonnifield and John G. Heid, their certain attorneys, executors, administrators, or assigns; — which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of February, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the district court of the United States for the district of Alaska, held at Sitka, in a suit pending in said court between S. A. Bonnifield and John G. Heid, plaintiffs, and Willis Thorp, defendant, a judgment was rendered against the said Willis Thorp for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs; and—

100 The said defendant, Willis Thorp, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiffs, S. A. Bonnifield and John G. Heid, citing and admonishing them to be and appear at a session of the United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in said circuit, on the — day of ——, 1896:

Now, the condition of the above obligation is such that if the said Willis Thorp shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, together with the amount of said judgment and interest thereon, then the above obligation to be void; else to remain in full force and virtue.

WILLIS THORP. [SEAL.]
JOHN OLDS. [SEAL.]
C. W. YOUNG. [SEAL.]
J. G. PETERSON. [SEAL.]
EMERY VALENTINE. [SEAL.]
J. D. MATTHUS. [SEAL.]

Sealed and delivered in presence of—
HARRISON BOSTWICK.
W. E. CREWS.

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

Charles W. Young, John Olds, J. D. Matthus, J. G. Peterson, and Emery Valentine, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally duly sworn, each for himself says—

That he is a resident and freeholder of the district of Alaska; that he is worth the sum of five thousand dollars ($5,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution; that he is not a judge, clerk, or marshal or any other officer of any court in Alaska, and that he is not an attorney-at-law.

101

JOHN OLDS.
C. W. YOUNG.
J. G. PETERSON.
EMERY VALENTINE.
J. D. MATTHUS.

Subscribed and sworn to before me this 6th day of February, 1896.

[L. S.] HARRISON BOSTWICK,
Notary Public for Alaska.

Approved by—
ARTHUR K. DELANEY,
Judge of the United States District Court for the District of Alaska.

This 10 day of February, 1896.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Bond on writ of error. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorney- for defendant.

102 And afterwards, on said date, a writ of error was issued in said cause, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska, Greeting:

The -cause in the record and proceedings, as also in the rendition of the judgment of a plea which in the said district court, before you, between S. A. Bonnifield and John G. Heid, plaintiffs, and Willis Thorp, defendant, a manifest error hath happened, to the great prejudice and damage of the said defendant, Willis Thorp, as is said and appears by the petition herein, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, in the State of California, together with this writ, so you have the same at the said place, in said circuit, on the 9th day of March, 1896, that, the record and proceedings
103 aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10 day of February, 1896.

Attest my hand and seal of the United States district court for the district of Alaska, at the clerk's office, at Sitka, Alaska, on the day and year last above written.

CHARLES D. ROGERS,
[L. S.] *Clerk United States District Court for the District of Alaska.*

Allowed:
ARTHUR K. DELANEY,
Judge of the United States District Court for the District of Alaska.

This 10 day of February, 1896.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs,

vs. Willis Thorp, defendant. Writ of error. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

104 And afterwards, on said date, there was issued out of said district court of Alaska a citation, which is in words and figures as follows:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant.
} No. 439. Citation.

UNITED STATES OF AMERICA,
District of Alaska, } *ss:*

To S. A. Bonnifield and John G. Heid, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, State of California, on the 9th day of March, in the year of our Lord one thousand eight hundred and ninety-six, pursuant to a writ of error filed in the clerk's office of the United States district court for the district of Alaska, wherein Willis Thorp is plaintiff in error and you are the defendants in error, to show cause, if any there be, why the judgment rendered against the said defendant, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

105 Witness the Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska, this 10 day of February, 1896.

ARTHUR K. DELANEY,
Judge of the United States District Court for the District of Alaska.

UNITED STATES,
District of Alaska, } *ss:*

I, Louis L. Williams, U. S. marshal for the district of Alaska, hereby certify that on the 10th day of February, 1896, at Sitka, Alaska, I served a certified copy of the within citation, as furnished by defendant's attorneys, on C. S. Johnson by delivering same to him.

Dated Sitka, Alaska, February 10, 1896.

LOUIS L. WILLIAMS,
U. S. Marshal,
By W. H. McNAIR, *Deputy.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Citation. Filed Feb. 10, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

106 And afterwards, to wit, on the 25th day of February, 1896, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

Now, on this day, this cause coming on to be heard upon the application of Willis Thorp, plaintiff in error, for an extension or enlargement of the time allowing the clerk of this court thirty days, additional time to make his return to the writ of error heretofore issued and served in this cause—

The court being now fully advised in the premises, it is hereby ordered and adjudged that the time be, and the same is hereby, extended for a period of thirty days from the expiration of the time in said writ named.

107 And afterwards, to wit, on the 25th day of February, 1896, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439. Affidavit.

THE UNITED STATES,
District of Alaska, } ss:

John G. Heid, being first duly sworn, deposes and says:

1.

I am one of the plaintiffs in the above-entitled action.

2.

I am a member of the law firm of Johnson & Heid, of Juneau, Alaska, and at all times since the commencement of the above-entitled action and up to the 1st day of February, 1896, have been one of the attorneys for the above-named plaintiffs, as will fully appear from the records and files in said action.

3.

I have read the affidavits of W. E. Crews, Harrison Bostwick, and S. A. Bonnifield, filed herein, copies of which were served upon C. S. Johnson, of said law firm of Johnson & Heid, on board the mail steamer "City of Topeka," on the 8th day of February, 1896, after said steamer had left Juneau and Douglas island, Alaska, for Sitka, Alaska; that it was then too late for affiant to prepare counter-affidavits to be used upon the hearing of defendant's motion to set aside the judgment in this action.

4.

108 That the allegations in the affidavits of said S. A. Bonnifield and W. E. Crews with the respect to the employment of the firm of Johnson & Heid as attorneys for said Bonnifield, as well as in many other respects, are grossly untrue; that from the commencement of the foregoing-entitled action and until after judgment was rendered and entered therein the said firm of Johnson & Heid were during all the times mentioned the attorneys for said plaintiff, Bonnifield, as well as for John G. Heid, the other plaintiff in said action, and as such attorneys were authorized by said Bonnifield to appear and represent him. As an evidence of that fact, affiant says that often and long prior to the discharge by said Bonnifield of Mr. J. F. Malony as one of his attorneys said Bonnifield expressly stated to affiant that he relied upon the said firm of Johnson & Heid to represent and protect his (Bonnifield's) interest in said action, giving as a reason why he depended upon affiant and said law firm of Johnson & Heid that he was afraid of Mr. Malony; that said Mr. Malony was the attorney for one Al. Runkle, whose interest in a certain lease to the Aurora Lode claim conflicted with his (Bonnifield's); that Mr. Malony was also the attorney for the Nowell Gold Mining Company, whose interests in and to part of the said Aurora Lode claim conflicted with his (Bonnifield's), also assigning other reasons; that at no time since the commencement of said action did the said Bonnifield, directly or indirectly, express to affiant his dissatisfaction of the course pursued by affiant and said law firm of Johnson & Heid in his (Bonnifield's) behalf, but, on the contrary, said Bonnifield expressed to this affiant his entire satisfaction and approval of the efforts made by said law firm in his behalf; that even after said Bonnifield signed said stipulation with defendant's attorneys extending the time in which to answer herein
109 said Bonnifield unqualifiedly desired that affiant and said law firm should continue to represent him, and when asked by this affiant his (Bonnifield's) reason for signing said stipulation when his said attorneys and his coplaintiff, this affiant, refused to extend *to* time in which to answer said Bonnifield replied to this affiant, saying that Bostwick & Crews, the attorneys for defendant Thorp, were his attorneys in other actions; that they had and did then attend to his other law matters and suits; that he, so far, had not paid them for their services; that he was under obligations to said Bostwick & Crews for that reason, and that under the circumstances he (Bonnifield) "had to favor them," etc. Affiant further says that neither he nor Johnson, of said law firm of Johnson & Heid, ever refused to appear for said Bonnifield upon the argument of the demurrer referred to in said Crews' affidavit and as alleged therein, but, on the contrary, this affiant states that they, the said law firm of Johnson & Heid, did, with full authority, appear not only for this affiant, but also for said Bonnifield upon the argument of said demurrer and at all times in said action and until after judgment rendered and entered herein. This affiant further says

that said Bonnifield, on the day mentioned when said demurrer was called on for argument, was not in court, nor was he then in the town of Juneau, but was in Silver Bow basin, about three and one-half miles distant from said town of Juneau, in which town the said court was then in session, and the allegation in paragraph III of said Bonnifield's affidavit that when said demurrer was called on to be heard said Bonnifield was not represented by counsel is false *in toto*, and the further statement contained in said paragraph III of said Bonnifield's affidavit to the effect that upon such a statement made by said Bonnifield to the court the hearing on
110 said demurrer was continued for one day is absolutely false, and the said Bonnifield, at the time of making said affidavit, knew the said allegation to be wholly untrue; that at the time mentioned with reference to the argument on said demurrer the said firm of Bostwick & Crews appeared for and represented the defendant, Willis Thorp, in this said action, and the said law firm of Johnson & Heid appeared therein for plaintiffs; that said Bonnifield was not, at the times mentioned, in the court-room nor near it, and there did not make and could not have made any statement to the court whatever.

5.

Affiant says that he was in the court at the time said Crews, on behalf of the said firm of Bostwick & Crews, near the end of the term of said district court, arranged with some of the opposing attorneys the time within which to plead in all cases of said firm wherein pleadings were due, and affiant says that said Crews did not announce his intention to the members of the bar to take a trip abroad, and no such statement or similar statement was made by said Crews to affiant when the court granted defendant herein 20 days within which to answer.

6.

Affiant says that owing to the peculiar professional methods of said firm of Bostwick & Crews, whose habit it is to approach the client of opposing counsel in order to gain an advantage to the said client's decided disadvantage, this affiant, believing that said Harrison Bostwick, of said firm of Bostwick & Crews, would not forego his practice in this case, took the precaution to call upon said Bonnifield (affiant's client) on or about December 24, 1895, and did state to said Bonnifield that the defendant in this action had failed to answer the complaint; that the time for answering the same
111 had expired; that affiant had refused to extend the time within which to answer, and that affiant had sent to the clerk of the court a motion for judgment for failure to answer; that Mr. C. S. Johnson, one of Bonnifield's attorneys, was then about to sail for Sitka to present the said motion for judgment to the court; that said Bonnifield should not permit himself to be persuaded to enter into any stipulations with said Harrison Bostwick with respect to the matter, and affiant further says that, in the conversation with said Bonnifield on said day, the words "snap judgment" were never used by affiant.

7.

Affiant further says he has read the statement published in the Alaska Mining Record, a newspaper published in the said town of Juneau, Alaska, which statement, in substance, is also set forth in said Bonnifield's affidavit, to the effect that not more than $800 is justly due said plaintiffs upon said judgment. Affiant says that said statement is wholly untrue, and the said firm of Bostwick & Crews, with whom the said Bonnifield is said to have had his alleged settlement of his share of the judgment herein, full well know that said statement is false. Affiant further says that said Bonnifield stated to this affiant that when making his alleged settlement he had forgotten or overlooked the sum of $3,500.00 to be charged said defendant, Thorp, for the ore mentioned in the complaint herein; also further stated that he did not examine the accounts, but simply settled on the gross sums which had been then submitted to him, and that he (Bonnifield) did not know if the statement and figures shown him at the so-called settlement were correct. Affiant further says that he, in company with Mr. J. F. Malony, the principal counsel then for said Bonnifield in
112 this matter, together with said Bonnifield, before the commencement of this action, did fully examine all the vouchers and receipts furnished by said defendant, Thorp, he, Thorp, claiming the same to be a full and complete account of the receipts and expenditures except the account of the Alaska Treadwell Gold Mining Company; which said account was approximated by said Bonnifield and allowed in a greater amount than was thought to be actually due thereon; that said Bonnifield represented that he had purchased the supplies for said Aurora lode or mine, was present during the working and operating of the same, and was familiar with all the expenses incurred except the labor account; that, not being familiar with said labor account, the same was allowed in full as presented by said defendant, Thorp; that all other items of receipts and expenditures were carefully examined by affiant, said Bonnifield, and said Malony, some time being consumed in said work; that each item allowed or disallowed in making up said account was allowed at the instance and request of said Bonnifield, who claimed to have and did have personal knowledge of said receipts and expenditures; that the amount claimed in said complaint was arrived at after said examination and compilation and after giving said defendant, Thorp, credit for all expenditures and claims justly due him, as shown by the receipts and vouchers furnished affiant by said Thorp, as aforesaid, and said amount sued for, to wit, $7,231.25, was found to be justly due said plaintiffs by affiant and said Bonnifield and said John F. Malony.

Affiant further says that in preparing the complaint filed in this action and upon which judgment has been rendered full credit was given the defendant for the amount paid by him in satisfaction of the mortgage held by Robert Duncan, Jr., and J. Parker Corbus and for all and every account and claim assumed or paid by
113 defendant for and on behalf of said Bonnifield and Runkle, and all of said amounts were included in and are part of the

$23,000.00 allowed to defendant as expenses incurred by him in working and operating said mine; that after allowing to defendant the amount of said mortgage and all of said accounts and all other expenses incurred by him in working and operating said mine there was found to be $12,500.00 profits to be divided, as in said complaint set forth. Affiant further says that he denies that he at any time agreed with said Bonnifield that the amount claimed in the complaint was more than was actually due, as is alleged in said paragraph V of said Bonnifield's affidavit.

8.

Affiant further says that if a settlement between the defendant Thorp, by and through his attorneys, Bostwick & Crews, and the said Bonnifield was had in good faith on the part of said Bonnifield, as alleged by him, then the said Bonnifield has been wronged in said settlement to the extent of at least $4,000.00.

9.

Affiant further says that the said Bonnifield never was the owner of $\frac{1}{8}$ parts of the judgment rendered in this action, as alleged in his and other affidavits on file herein, but was entitled to $\frac{7}{8}$ only of the same, as will fully appear from the complaint and other files in this action; that the alleged settlement of and payment to said Bonnifield of his interest in said judgment, if any such was really had, was without the knowledge and consent of his attorneys or either of them or his coplaintiff.

JOHN G. HEID.

Subscribed and sworn to before me this 24th day of February, 1896.

[L. S.]

C. S. JOHNSON,
Notary Public.

114 I acknowledge receiving a copy of the above affidavit of the above date.

W. E. CREWS.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. S. A. Bonnifield and J. G. Heid *vs.* Willis Thorp. Affidavit of J. G. Heid. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ffs.

And afterwards, on the same date, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

THE UNITED STATES, *District of Alaska,* } *ss:*

I, C. S. Johnson, being duly sworn, depose and say:

1.

I have read the affidavits of S. A. Bonnifield, W. E. Crews, and Harrison Bostwick filed herein, copies of which were served upon me on board the mail steamer "City of Topeka," on the 8th day of February, 1896, after said boat had left Juneau and Douglas island, Alaska, for Sitka, Alaska; that it was too late for affiant to prepare counter-affidavits to be used upon the hearing of defendant's motion to set aside the judgment in this action.

2.

That the allegations in the affidavit- of said S. A. Bonnifield and W. E. Crews in reference to the employment of the firm of Johnson & Heid, as attorneys for said S. A. Bonnifield, are untrue in
115 many respects; that said firm of Johnson & Heid were at all times from the commencement of said action until after judgment was rendered fully employed and authorized by said Bonnifield to appear for and represent him as his attorneys. As an evidence of that fact, affiant says that on many occasions, long prior to the discharge by him of Mr. John F. Malony as one of his attorneys, said Bonnifield assured affiant that he looked to and depended upon him to represent and protect his (Bonnifield's) interests in said action, assigning as a reason why he specially depended upon affiant that he was afraid of Mr. Malony; that ever since the commencement of this action affiant has been in frequent communication with said Bonnifield up to the time and after taking of default herein, and upon such occasions said Bonnifield expressed his entire satisfaction and approval of the course pursued by affiant and said John G. Heid in his behalf; that after the default had been entered herein, and after said Bonnifield had signed the stipulation with defendant's attorneys extending the time in which to answer in this action, affiant asked him if he desired the firm of Johnson & Heid to continue to represent him; he assured affiant that he did, and expressed his satisfaction and approval of what had been done in taking said default.

Affiant further says when the demurrer filed herein was called for argument neither he nor Mr. Heid refused to appear for said Bonnifield, nor did either Mr. Heid or affiant say they had no authority so to do. On the contrary, this affiant said in open court on said occasion that while we (the firm of Johnson & Heid) had appeared with Mr. Malony for Mr. Bonnifield we preferred to see Mr. Bonnifield before proceeding further, inasmuch as he had discharged Mr.

Malony, his principal attorney. Whereupon the court continued the hearing upon said demurrer until the next day. In the
116 meantime affiant asked said Bonnifield whether he desired the firm of Johnson & Heid to continue to represent him in said action. He assured affiant that he did, saying that he depended upon us to take care of his interests. Affiant therefore announced on the following day in open court and in the presence of defendant's attorney that he had seen Mr. Bonnifield, and was authorized by him to continue to represent his interest in said action; and affiant says said S. A. Bonnifield was not in court when said demurrer first came on for hearing, and did not state to the court, as alleged in his affidavit, that he had not employed counsel to represent him, etc., but said allegation is wholly untrue.

3.

Affiant further says he was in court at the time of the overruling of said demurrer, yet he did not hear said W. E. Crews announce his intention to take a trip abroad, and did not hear him ask that in all cases in which pleadings were due on his part that the same be continued for sixty days. On the contrary, affiant says no such statement was made, nor was affiant at any time asked by said W. E. Crews or by H. Bostwick to extend the time beyond the 20 days in which to answer, until after default had been made, to wit, on the 24th day of December, 1895; that the 20 days granted by the court in which to answer was so granted at the request of said W. E. Crews and assented to by this affiant.

What report said W. E. Crews made to his partner, Mr. Bostwick, in regard to the time given in which to answer affiant is unable to state; but affiant says the clerk of the firm of Bostwick & Crews was not in court when the demurrer was overruled and the time fixed in which to answer, and could only have made the docket entry referred to upon information given her by her employers.

117 4.

And affiant further says said S. A. Bonnifield never was the owner of $\frac{7}{8}$ of the judgment rendered in this action, as alleged in his and other affidavits on file herein, but was entitled to $\frac{7}{9}$ only of the same, as will fully appear from the complaint and other files in this action; that the alleged settlement of and payment to said Bonnifield of his interest in said judgment, if any such was had, was without the knowledge or consent of his attorneys or either of them; that the first information had that said Bonnifield was dissatisfied with the judgment rendered or had made any settlement of the same with said defendant was his published statement to that effect in the "Alaska Mining Record," a newspaper of general circulation published at Juneau, Alaska; that after said publication and after said Bonnifield had made his pretended settlement and received his share of said judgment he assured this affiant he had not received his money from defendant upon said settlement, but expected to do so, and affiant is unable to explain the action of said

Bonnifield in reference thereto since the rendering of said judgment, as he has at all times since said suit was commenced until said pretended settlement was had claimed that the amount in his complaint alleged was justly due; but affiant knows said Bonnifield is indebted in the sum of several thousand dollars; that there are many unsatisfied judgments now standing against him on the judgment dockets of the courts of Alaska; that the said Bostwick & Crews are his attorneys in suits now pending involving much larger amounts than the amount of the judgment rendered herein, and that he has been in close communication with them ever since and even prior to the taking of the default in this action, and affiant believes for these and other reasons which must be apparent to the court
118 said S. A. Bonnifield has been induced by said Bostwick & Crews to pursue the course he has for the purpose of aiding them and impeding his coplaintiff, John G. Heid, in the collection of his just claim against said defendant.

C. S. JOHNSON.

Subscribed and sworn to before me this 20th day of February, 1896.

J. F. MALONY,
[L. S.] *Notary Public.*

I acknowledge receiving a copy of the above affidavit of the above date.

W. E. CREWS.

(Endorsed:) No. 439. In U. S. dist. court, district of Alaska. S. A. Bonnifield and John G. Heid *vs.* Willis Thorp. Affidavit of C. S. Johnson. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, attorneys for pl'ff Heid.

And afterwards, on the same date, the plaintiffs filed the following affidavit, which is in words and figures following, to wit:

In the United States District Court for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID *vs.* WILLIS THORP. } No. 439. Affidavit.

THE UNITED STATES, *District of Alaska,* } ss:

I, John F. Malony, being first duly sworn, depose and say that at the time of the commencement of the above-entitled action I was one of the attorneys for S. A. Bonnifield, one of the above-named plaintiffs; that as such attorney I drew and prepared the
119 complaint now on file in said action, and upon which judgment was rendered in favor of said plaintiffs on the 25th day of January, 1896.

That prior to the making and filing of said complaint I requested

of defendant, Willis Thorp, an itemized statement of the receipts and expenditures incident to the operation of the Aurora Lode claim; that said defendant failed and neglected for a long time to furnish affiant or said Bonnifield with any statement, but that about ten days or two weeks prior to the making and filing of said complaint said defendant did furnish affiant with certain vouchers and receipts, claiming the same to be a full and complete account of said receipts and expenditures except the account of the Alaska Treadwell Gold Mining Company, which said account was approximated by said Bonnifield and allowed in a greater amount than was thought to actually be due thereon; that upon receipt of said vouchers and receipts this affiant, together with said Bonnifield and said John G. Heid, carefully examined and compiled the same; that affiant and said Heid were guided, directed, and controlled in said work by said S. A. Bonnifield; that said Bonnifield represented that he had purchased the supplies for said mine, was present during the working and operating of the same, and was familiar with all expenses incurred except the labor account; that not being familiar with said labor account the same was allowed in full as presented by said defendant, Thorp; that all other items of receipts and expenditures were carefully examined by affiant and said Bonnifield and Heid, several days being consumed in said work; that each item allowed or disallowed in making up said account was allowed or disallowed at the instance and request of said Bonnifield, who claimed to have and did have personal knowledge of said receipts and expenditures; that the amount claimed in said com-
120 plaint was arrived at after said examination and compilation and after giving said defendant, Thorp, credit for all expenditures and claims justly due him as shown by the receipts and vouchers furnished affiant by said Thorp, as aforesaid, and said amount sued for, to wit, $7,231.25, was found to be justly due said plaintiffs by affiant and said S. A. Bonnifield and said John G. Heid.

Affiant further says he has read the statement published in the Alaska Mining Record, purporting to be the statement of said Bonnifield, wherein he claims that not more than $800.00 is justly due said plaintiffs upon said judgment; that if said statement is true then said S. A. Bonnifield wilfully misrepresented the facts in said case to this affiant and said John G. Heid and wilfully and intentionally misled the court in the premises; but affiant says from his knowledge of the facts in said action obtained from a careful examination of said vouchers and receipts and from the statements made to him by said S. A. Bonnifield he believes that the true amount due said plaintiffs is the sum for which judgment has been rendered in said action, and that said Bonnifield has been induced to make statements to the contrary for reasons unknown to affiant.

Affiant further says that in preparing the complaint filed in this action and upon which judgment has been rendered full credit was given the defendant for the amount paid by him in satisfaction of the mortgage held by Robert Duncan, Jr., and J. Parker Corbus, and for all and every account and claim assumed or paid by him for and

on behalf of said Bonnifield and Runkle, and all of said amounts were included in and are a part of the $23,000.00 allowed to defendant as expenses incurred by him in working and operating said mine; that after allowing to defendant the amount of said
121 mortgage and all of said accounts and all other expenses incurred by him in working and operating said mine there was found to be $12,500.00 profits to be divided as in said complaint set forth.

Affiant says he is not, nor was he at the time judgment was rendered, an attorney in said action nor has he any interest in the result of said suit, but that this affidavit is made that substantial justice may be done in the premises.

J. F. MALONY.

Subscribed and sworn to before me this 20th day of February, 1896.

C. S. JOHNSON,
[L. S.] *Notary Public for Alaska.*

I acknowledge receiving a copy of the above affidavit of the above date.

W. E. CREWS.

(Endorsed:) No. 439. In U. S. district court, district of Alaska. S. A. Bonnifield *et al. vs.* Willis Thorp. Affidavit of J. F. Malony. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Johnson & Heid, att'ys for pl'ff Heid.

122 And afterwards, to wit, on the 25th day of February, 1896, the following further proceedings were had and appear of record in said cause, to wit:

S. A. BONNIFIELD and JOHN G. HEID
vs.
WILLIS THORP. } No. 439.

Now, on this 25th day of February, 1896, this cause coming on to be heard upon the motion of Willis Thorp, plaintiff in error herein, to strike from the files the affidavits of John G. Heid, C. S. Johnson, and John F. Malony for the reasons, as shown by the record, that the assignment of errors was filed, the writ of error issued and served, and the citation issued and served fifteen days prior to the filing of the affidavits; that the affidavits do not tend to explain the point for which they were allowed by the court; that the court has no jurisdiction to consider said affidavit- or to permit them to be made part of the record herein, the same having been filed so long after the writ of error was issued and the citation issued and served and the bill of exceptions settled and filed—

And the court, being fully advised in the premises, hereby orders that the motion be overruled and the affidavits be made part of the record; to which order of the court counsel for plaintiff in error duly excepted, and his exception was by the court allowed.

123 And afterwards, to wit, on the 25th day of February, 1896, the defendant filed the following notice, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Notice.

You and each of you will please take notice that an application will be made before Honorable Arthur K. Delaney, judge of the United States district court for the district of Alaska, for a settlement of the statement of facts or bill of exceptions and the signing of the same in the foregoing-entitled cause on the arrival of the mail steamer City of Topeka at the town of Sitka, Alaska, on or about the 24th day of February, 1896, or as soon thereafter as counsel can be heard; a copy of which said statement of facts will be served upon you before the departure of said mail steamer City of Topeka from Juneau to Sitka.

Juneau, Alaska, February 13th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson & Heid, attorneys for John G. Heid.

Copy of within notice received and due service of the same acknowledged this 13th day of February, 1896.

JOHNSON & HEID,
Attorneys for John G. Heid.

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. S. A. Bonnifield *et al.*, plaintiffs, *vs.* Willis Thorp, defendant. Notice. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant.

124 And afterwards, to wit, on the 25th day of February, 1896, the defendant filed his bill of exceptions, which is in words and figures following, to wit:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } No. 439. Bill of Exceptions.

Be it remembered that this cause was duly called for hearing in the United States district court for the district of Alaska at the November term, 1895, upon defendant's general demurrer to plaintiffs' complaint. Said demurrer and the questions raised thereby *was* duly argued and submitted to the court, who, after duly considering the same, made an order overruling defendant's general demurrer

to plaintiffs' complaint; to which order overruling defendant's general demurrer to plaintiffs' complaint defendant duly excepted; which exception was allowed by the court.

Whereupon defendant was allowed by the court and consent of counsel twenty (20) days in which to file his answer.

That soon thereafter, on the 26th day of December, upon the expiration of the twenty (20) days in which to answer, defendant having failed within the time to serve and file his answer, plaintiffs, without notice to the defendant, made application to the United States district court for the district of Alaska, at Sitka, for default and judgment against the defendant.

Whereupon the court permitted the plaintiffs to take default.

That thereafter and immediately upon the entering of said
125 default, to wit, as soon as the boat arrived from Sitka, counsel for defendant prepared and served upon counsel for plaintiffs notice of motion and motion to set aside the default entered as aforesaid; which said notice of motion and motion *is* in words and figures as follows:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant.	No. 439. Notice of Motion.

Take notice that upon the affidavits *a* copies of which *is* herewith served the undersigned will move the court, at Sitka, on the arrival of the next mail steamer, the City of Topeka, on or about the 8th day of January, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the order of default granted against the defendant in this action on the 26th day of December, 1895, and also for an order setting aside all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare and serve his answer herein; that the defendant's reasons for asking to have said default vacated and set aside are as follows, to wit:

First. Upon the ground that said default was taken against the defendant through his mistake, inadvertance, surprise, and excusable neglect.

Second. For the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield, giving the de-
126 fendant until March 1st, 189[illegible], in which to serve and file his answer.

Third. For the reason that the defendant's attorneys herein notified the attorneys for John G. Heid, to wit, Messrs. Johnson and Heid, that they intended to file answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson and Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that the defendant was unexpectedly called away to attend a lawsuit, in which he was a party defendant, at North Yakima, in the State of Washington, and the defendant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that the defendant's attorneys inadvertantly overlooked the date when an answer was due in this case until the morning of the 23rd of December, 1895, at which time the defendant had gone to Washington.

Sixth. For the reason that the defendant has a good, substantial, and meritorious defense to this cause.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Johnson & Heid, attorneys for John G. Heid, and to S. A. Bonnifield, plaintiff.

Copy of within notice of motion received and due service of the same acknowledged this 28th day of December, 1895.

JOHNSON & HEID,
Attorneys for Plaintiffs.

Motion.

127 Comes now the defendant, by and through his attorneys, Messrs. Bostwick and Crews, and moves the court for an order vacating, setting aside, and holding for naught the order of default heretofore granted in this action against the defendant and in favor of the plaintiffs; also for an order setting aside and holding for naught all subsequent proceedings had by the plaintiffs herein; also for an order permitting and allowing the defendant further time in which to prepare, serve, and file his answer herein; that the defendant's reasons for asking to have said default set aside and held for naught, and all subsequent proceedings had by plaintiffs set aside and held for naught, and for additional time to serve and file his answer herein are based upon the following grounds, to wit:

First. Upon the ground that said default was taken against the defendant through his mistake, inadvertance, surprise, and excusable neglect.

Second. For the reason that the defendant relied upon the stipulation made by the plaintiff S. A. Bonnifield giving the defendant until March 1st, 1896, in which to serve and file his answer.

Third. For the reason that the defendant's attorneys herein notified the attorneys for John G. Heid, to wit, Messrs. Johnson and Heid, that they intended to file an answer for defendant herein and requested further time in which to do so, and attorneys for defendant did not apprehend that Messrs. Johnson and Heid would take a default against the defendant after being advised that defendant intended filing answer herein.

Fourth. For the reason that defendant was unexpectedly called away to attend a lawsuit, in which he was a party defendant, at

North Yakima, in the State of Washington, and the defend-
128 ant's attorneys were unable to file answer in the absence of defendant.

Fifth. For the reason that defendant's attorneys inadvertently overlooked the date when an answer was due in this case until the morning of the 23rd day of December, at which time the defendant had gone to Washington.

Sixth. For the reason that the defendant has a good and meritorious defense in this cause.

Seventh. For the reason that the said default was taken by the plaintiffs against the defendant through fraud practised by Johnson & Heid, attorneys for the plaintiff Heid.

This motion is based upon the affidavits of H. Bostwick herewith filed and upon all the records, files, papers, and proceedings had and done in this action.

Juneau, Alaska, December 28th, 1895.

BOSTWICK & CREWS,
Attorneys for Defendant.

Copy of within motion received and due service of the same acknowledged this 28th day of December, 1895.

JOHNSON & HEID,
Attorneys for Plaintiffs.

Together with the filing and serving of said notice of motion and motion upon plaintiffs' attorneys, counsel for defendant made and served affidavits in support thereof, as shown by the records and files in this cause.

That thereafter a stipulation was entered into between counsel for plaintiffs and defendants that said motion be submitted to the judge of the United States district court for the district of Alaska, at Sitka, upon the affidavit and briefs of counsel without argument.

129 That thereafter, on, to wit, the 25th day of January, 1896, the court, after considering the motion, affidavits, files, and records in support thereof, made an order denying defendant's motion to vacate and open up said default, and thereupon, without further notice or motion, and at the same time, rendered judgment against the defendant, in accordance with the prayer of plaintiffs' complaint; to which ruling of the court defendant thereafter duly excepted, and his exceptions were duly allowed by the court.

That thereafter and immediately upon notice from the court of the fact of the overruling of said motion defendant made, prepared, and served his notice of motion and motion upon the attorneys for plaintiffs to set aside and vacate the judgment so rendered and for permission to file his answer; which said notice of motion and motion are in words and figures as follows:

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs, *vs.* WILLIS THORP, Defendant. } No. 439. Notice of Motion.

You and each of you will please take notice that the defendant, by and through his attorneys, Messrs. Bostwick and Crews, will move before Honorable Arthur K. Delaney, judge of the district court of the United States for the district of Alaska, at the courthouse, in Sitka, Alaska, on the arrival of the next mail steamer, City of Topeka, on or about the 9th day of February, 1896, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment heretofore granted and entered in
130 this cause in favor of the plaintiffs and against the defendant, on, to wit, January 25th, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon the said judgment.

Also for an order permitting and allowing the defendant to file his answer, which is herewith presented, duly verified.

That said motion is based upon the verified answer of said defendant and upon all affidavits, the files, records, papers, and proceedings had and done in said cause.

Dated Juneau, Alaska, January 29, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

To Messrs. Johnson and Heid, attorneys for John G. Heid and S. A. Bonnifield, plaintiffs.

Copy of within notice of motion received and due service of the same acknowledged this 29th day of January, 1896.

JOHNSON & HEID,
Attorneys for Plaintiffs.

Motion.

Comes now the defendant, by and through his attorneys, Messrs. Bostwick and Crews, and moves the court for an order vacating, setting aside, and holding for naught the judgment heretofore granted and filed in this cause in favor of the plaintiffs and against the defendant, on, to wit, January 25th, 1896, for the sum of seven thousand two hundred sixty-four and $\frac{80}{100}$ dollars ($7,264.80), damages and costs.

131 Also for an order staying the execution heretofore and on, to wit, January 25th, 1896, issued upon said judgment.

Also for an order staying, setting aside, and holding for naught any and all subsequent proceedings had by the plaintiffs on account of said judgment.

Also for an order permitting and allowing the defendant to file his answer in this cause.

This motion is based upon the verified answer of the defendant and upon all the files, records, affidavits, and proceedings had and done in the foregoing-entitled cause.

Dated Juneau, Alaska, January 29th, 1896.

BOSTWICK & CREWS,
Attorneys for Defendant.

Copy of within motion received and due service of the same acknowledged this 29th day of January, 1896.

JOHNSON & HEID,
Attorneys for Plaintiffs.

In support of which said motion affidavits and verified answer, as indicated by the records herein, were filed with said court.

That thereupon and on, to wit, the 10th day of February, 1896, plaintiffs and defendant appeared before the court, by their respective attorneys, and argued said motion to set aside said judgment, default, and leave to file verified answer herein. After hearing argument of counsel the court made an order denying defendant's motion to set aside and vacate said judgment and for leave to file an answer; to which order of the court defendant duly excepted, and his exception was duly allowed by the court.

BOSTWICK AND CREWS,
Attorneys for Defendant in Error.

132 The foregoing bill of exceptions is correct, and it is hereby agreed that the same may constitute a part of the record and be certified to the court of appeals, and there be used as the bill of exceptions in this cause.

JOHNSON & HEID,
Attorneys for Defendant in Error, John G. Heid.
BOSTWICK AND CREWS,
Attorneys for Plaintiff in Error, Willis Thorp.

The foregoing bill of exceptions is correct, and is hereby settled and allowed and ordered to be made part of the record in this cause.

Dated Sitka, Alaska, this 25 day of February, 1896.

ARTHUR K. DELANEY, *Judge.*

(Endorsed:) Original, No. 439. In the district court of the United States for the district of Alaska. Bonnifield and Heid, plaintiff-, *vs.* Willis Thorp, defendant. Bill of exceptions. Filed Feb. 25, 1896. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for defendant. Copy of within bill of exceptions received and due service of the same acknowledged this 17th day of Feb., 1896. Johnson & Heid, attorneys for def't in error, John G. Heid.

133 UNITED STATES OF AMERICA, *District of Alaska*, } 88:

I, Charles D. Rogers, clerk of the district court of the United States of America for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to (133) one hundred thirty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of S. A. Bonnifield and John G. Heid, plaintiffs, *vs.* Willis Thorp, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the town of Sitka, in said district, the 11 day of March, A. D. 1896.

[Seal United States District Court, Alaska.]

CHARLES D. ROGRRS, *Clerk.*

In the District Court of the United States for the District of Alaska.

S. A. BONNIFIELD and JOHN G. HEID, Plaintiffs,
vs.
WILLIS THORP, Defendant. } Clerk's Certificate.

I, Charles D. Rogers, clerk U. S. district court, district of Alaska, do hereby certify that the cost for certificates and comparing the transcript in the above-entitled cause is fifteen dollars (copies of the pleadings and orders having been prepared by the defendant), which amount I have received from the defendant, Willis Thorp.

In witness whereof I have hereunto set my hand and affixed the seal of said court.

[Seal United States District Court, Alaska.]

CHARLES D. ROGERS,
Clerk U. S. District Court.

134 At a stated term, to wit, the October term, A. D. 1897, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Tuesday, the sixth day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

WILLIS THORP, Plaintiff in Error,
v.
S. A. BONNIFELD ET AL., Defendants in Error. } No. 289.

Pursuant to an act of Congress entitled "An act providing for the transfer from the circuit court of appeals for the ninth circuit to the Supreme Court of certain appeals from the district court for Alaska," approved July 8, 1898, upon application of Harrison Bostwick, Esquire, counsel for the plaintiff in error, it is ordered that the original certified transcript of record herein be transmitted by

the clerk of this court to the Supreme Court of the United States.

135 I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the within-entitled cause.

Attest my hand and the seal of said circuit court of appeals this 7th day of Sept., A. D. 1898.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[5-cent U. S. internal-revenue stamp, canceled Sept. 7, 1898. F. D. M., clerk.]
[5-cent U. S. internal-revenue stamp, canceled Sept. 7, 1898. F. D. M., clerk.]

[Endorsed:] No. —. U. S. circuit court of appeals for the ninth circuit. Certified copy of order. Filed ——, 189–. ——, clerk.

Endorsed on cover: Case No. 17,040. U. S. C. C. of appeals, 9th circuit. Term No., 153. Willis Thorp, plaintiff in error, *vs.* S. A. Bonnifield *et al.* Filed October 25th, 1898.